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SUPREME COURT, U.S.

NO. 81-6437

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JIMMY LEE SMITH,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF FLORIDA

STEVEN L. BOLOTIN
ASSISTANT PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
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(MEMBER OF THE BAR OF THIS COURT)

QUESTION PRESENTED

PAGE(S)

QUESTION

THE FLORIDA SUPREME COURT'S AFFIRMANCE OF PETITIONER'S CONVICTION AND DEATH SENTENCE, IN WHICH IT APPROVED A PRACTICE WHEREIN THE TRIAL COURT SPECIFICALLY ADVISED THE JURY THAT HE HAD FOUND PETITIONER'S CONFESSION TO BE VOLUNTARY, LEFT UNREDRESSED A VIOLATION OF PETITIONER'S RIGHT TO DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS, AND ESTABLISHED PRECEDENT WHICH WILL PERMIT AND PERHAPS ENCOURAGE SUCH CONSTITUTIONALLY IMPROPER DISCLOSURE IN SUBSEQUENT CRIMINAL TRIALS. 5

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CITATION TO OPINION BELOW

The opinion of the Supreme Court of Florida in Smith v. State, 407 So.2d 894 (Fla. 1981) is set forth in Appendix A. The motion for rehearing and the denial thereof are set forth in Appendix B.

JURISDICTION

Review is sought pursuant to 28 U.S.C. § 1257(3). The judgment below was entered on November 12, 1981, and petitioner's timely motion for rehearing was denied on January 28, 1982.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a criminal conviction resulting in imposition of the death penalty. Constitutional provisions involved are the Fifth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Petitioner was convicted, after a jury trial, of two counts of first degree murder, and was sentenced to death. At trial, the court heard evidence, outside the presence of the jury, regarding the voluntariness of petitioner's inculpatory statements. He ruled that the statements were voluntary and therefore admissible. When the jury returned, and as the state proceeded to introduce the statements into evidence, the court commented three times in succession (see Appendix A, p. 4):

> The Court has ruled that the statement has been freely and voluntarily given by the Defendant, Jimmy Lee Smith, and admitted into evidence. It will be for your consideration at this time.
>
> * * * * * * *
>
> The Court will rule that this statement was freely and voluntarily given. It will be admitted into evidence at this time.
>
> * * * * * * *
>
> The Court will rule that that statement was freely and voluntarily given and will now be admitted into evidence.

On appeal to the Supreme Court of Florida, petitioner argued, inter alia, that the trial court erred by informing the jury that he had found the statements voluntary, since such comment on the evidence would necessarily tend to influence the jury's determination of the weight and credibility of the statements. Petitioner also argued on appeal that the trial court erred by failing to give the jury any instruction regarding the weight to be given a confession. The state, in its answer brief, contended, inter alia, that petitioner was barred from asserting these issues on appeal, as a result of defense counsel's failure to object to the trial court's disclosure to the jury of its finding of voluntariness, and his failure to object to the omission of an instruction on the weight to be given a confession.

The Supreme Court of Florida issued an opinion on November 12, 1981, affirming petitioner's convictions and death sentences. The Court determined that the trial court's failure to instruct the jury on the weight to be accorded a confession was error, but further concluded that it was not "fundamental error", and therefore was not cognizable for the first time on appeal. Smith v. State, supra, at 897-98. With respect to the trial court's advising the jury of its finding of voluntariness, the Florida Supreme Court did not apply a contemporaneous objection rule, but rather addressed the issue on the merits and concluded that such disclosure was not error. The Court said:

> We see the statements as attempts to comply with the requirement expressed in Sims v. Georgia, 385 U.S. 538, 87 S.Ct. 639, 17 L.Ed.2d 593 (1967), that the trial court clearly indicate, in the record, its conclusion that any confession admitted into evidence was voluntarily made:
>
> > [I]t is not for the jury to make the primary determination of voluntariness. Although the judge need not make formal findings of fact or write an opinion, his conclusion that

> the confession is voluntary must appear from the record with unmistakable clarity.

Id. at 544, 87 S.Ct. at 643.

Referring to the same topic, this Court stated as follows:

> The requirement of the Fourteenth Amendment is that the trial judge make a determination that a confession was freely and voluntarily given before he allows it to be considered by a jury. A specific finding of voluntariness is necessary to ensure that a judge has properly met this requirement.

McDole v. State, 283 So.2d 553, 554 (Fla. 1973) (citations omitted).

> The judge in the case sub judice was doing just that: making, with unmistakable clarity, a finding for the record that appellant's confessions were voluntarily made. His comments, therefore, were not improper.

Smith v. State, supra, at 897.

Petitioner timely moved for rehearing, which was denied on January 28, 1982.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Petitioner asserted on appeal that his right to due process of law, guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, as well as by Article I, Section 9 of the Florida Constitution, was violated by the trial court's disclosure to the jury of his finding that petitioner's statements were voluntary, and by the court's failure to instruct the jury on the weight to be given a confession. Smith v. State, supra, at 896-97. The Supreme Court of Florida addressed the former issue on the merits, and concluded that the trial court's disclosure to the jury of its finding of voluntariness was a proper means of complying with the requirement expressed in Sims v. Georgia, 385 U.S. 538, 87 S.Ct. 639, 17 L.Ed.2d 593 (1967),

that before admitting a confession into evidence, the court must make, with unmistakable clarity, a finding for the record that the confession was voluntarily made. Smith v. State, supra, at 897.

REASONS FOR GRANTING WRIT

QUESTION PRESENTED

THE FLORIDA SUPREME COURT'S AFFIRMANCE OF PETITIONER'S CONVICTION AND DEATH SENTENCE, IN WHICH IT APPROVED A PRACTICE WHEREIN THE TRIAL COURT SPECIFICALLY ADVISED THE JURY THAT HE HAD FOUND PETITIONER'S CONFESSION TO BE VOLUNTARY, LEFT UNREDRESSED A VIOLATION OF PETITIONER'S RIGHT TO DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS, AND ESTABLISHED PRECEDENT WHICH WILL PERMIT AND PERHAPS ENCOURAGE SUCH CONSTITUTIONALLY IMPROPER DISCLOSURE IN SUBSEQUENT CRIMINAL TRIALS.

The trial judge, on three successive occasions, gratuitously advised the jury that he had found that petitioner's statements were freely and voluntarily made. On appeal, the Supreme Court of Florida specifically approved this disclosure as a proper means of complying with the requirements set forth in Sims v. Georgia, 385 U.S. 538, 87 S.Ct. 639, 17 L.Ed.2d 593 (1967) and McDole v. State, 283 So.2d 553 (Fla. 1973) that before admitting a confession into evidence the trial court must make, with unmistakable clarity, a finding for the record that the confession was voluntarily made. In so holding, the Florida Supreme Court reached the polar opposite conclusion from virtually every other appellate court which has had occasion to discuss the issue. Until now, it has consistently been held, assumed, or stated by way of dicta, that the trial court's finding of voluntariness should not be disclosed to the jury. See United States v. Bear Killer, 534 F.2d 1253, 1258-59 (8th Cir. 1976); United States v. Barry, 518 F.2d 342, 348 (2nd Cir. 1975); United States v. Harper, 432 F.2d 100, 102 (5th Cir. 1970); Ellis v. Fitzharris, 407 F.2d 799, 803 n.8 (9th Cir. 1969); United States v. Fayette, 388 F.2d 728, 736 (2nd Cir. 1968); Kristiansand v. United States, 384 F.2d 301 (5th Cir. 1967); Clifton v. United States, 371 F.2d 354, 360 (D.C. Cir. 1966); United States v. Inman, 352 F.2d 954 (4th Cir. 1965).

See also Kagebein v. State, 496 SW.2d 435, 440-41 (Ark. 1973); Walker v. State, 488 SW.2d 40, 41 (Ark. 1972); Duguay v. State, 240 A.2d 738, 740 (Maine 1968); Dempsey v. State, 355 A.2d 455, 460-63 (Md. 1976); Harris v. Commonwealth, 358 NE.2d 991, 993 n.3 (Mass. 1976); State v. Yough, 231 A.2d 598, 604 (N.J. 1967); State v. Loray, 195 A.2d 289, 292 (N.J. 1963); State v. Smith, 161 A.2d 520, 545-46 (N.J. 1960); State v. Carter, 151 SE.2d 602, 605 (N.C. 1966); State v. Barber, 151 SE.2d 51, 53 (N.C. 1966); State v. Seal, 160 NW.2d 643, 647 (S.D. 1968); Noe v. Commonwealth, 153 SE.2d 248, 250 (Va. 1967).

Florida employs the "Orthodox Rule" in determining the voluntariness of a confession. See Palmes v. State, 397 So.2d 648, 653 (Fla. 1981); Leach v. State, 132 So.2d 329, 333 (Fla. 1961); Bates v. State, 78 Fla. 692, 696, 84 So. 373, 374-75 (1919). Evidence concerning the voluntariness of a confession is presented first to the trial judge, who determines admissibility, and then to the jury, which determines the weight to be accorded the confession considering, inter alia, the circumstances under which it was made. Palmes v. State, supra, at 653. The initial inquiry into voluntariness, to determine admissibility, must be held in the absence of the jury. Allen v. State, 239 So.2d 33 (Fla. 1st DCA 1970); see McDonnell v. State, 336 So.2d 553 (Fla. 1976); Land v. State, 293 So.2d 704 (Fla. 1974). Since the jury must also be allowed to consider the voluntariness of the confession, among other factors and circumstances, in determining what weight to give it, it is inherently and fundamentally unfair to permit the jury's assessment to be influenced, if not effectively dictated, by the trial court's announced finding that he has found the confession voluntary. See United States v. Bear Killer, 534 F.2d 1253, 1259 (8th Cir. 1976); United States v. Barry, 518 F.2d 342, 348 (2nd Cir. 1975).

In United States v. Bear Killer, supra (at 1258), the trial court had instructed the jury in the following manner:

> The Court instructs you that it has found that the statement made by the defendant at the time of his arrest was voluntary and based upon the Court's finding the Government witnesses were permitted to testify as to certain statements which the defendant was alleged to have made. However, it is for the jury to determine the credibility and weight to be given to such statements with respect to the defendant's innocence or guilt.

The Eighth Circuit Court of Appeals concluded that the above instruction was violative of 18 U.S.C. § 3501(a), which provides that if the trial judge determines that a confession was voluntarily made it shall be admitted into evidence, and that the jury shall then be permitted to hear relevant evidence on the issue of voluntariness and shall be instructed to give such weight to the confession as they feel it deserves under all the circumstances. [As previously noted, Florida uses a similar procedure.] The Court of Appeals went on to discuss the constitutional basis of its holding:

> Moreover, irrespective of the statutory command, fairness requires that the court not disclose to the jury its finding of voluntariness. See United States v. Harper, 432 F.2d 100, 102 (5th Cir. 1970); Ellis v. Fitzharris, 407 F.2d 799, 803 n.8 (9th Cir. 1969); United States v. Fayette, 388 F.2d 728, 736 (2nd Cir. 1968). Disclosure places upon the in-custody statements the imprimatur of the court which, it must be presumed, influences the jury. See Lego v. Twomey, supra 404 U.S. at 483-484, 92 S.Ct. at 623-624, 30 L.Ed. 2d at 623-624.
>
> The determination of the admissibility of in-custody statements turns upon their voluntariness. The court, in the suppression hearing, is concerned solely with the vindication of the constitutional right. Indeed it is error for the court to consider, in any degree, the reliability of the confession. Id. 404 U.S. at 484 n.12, 92 S.Ct. at 624, 30 L.Ed.2d at 624; Hutcherson v. United States, 122 U.S. App.D.C. 51, 351 F.2d 748, 755 (1965). Hence, the instruction which discloses the court's finding of voluntariness

> not only improperly influences the jury in its determination of guilt or innocence, but does so when the reliability of the in-custody statements was irrelevant to the court's finding and not determined by it. Moreover, the government's burden of proving guilt beyond a reasonable doubt under In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed. 2d 368 (1970), is lightened to the extent that the jury accepts the in-custody statements as truthful because of the court's determination, made upon a preponderance of the evidence, that the statements are voluntary. See Lego v. Twomey, supra 404 U.S. at 486, 92 S.Ct. at 625, 30 L.Ed.2d at 625.
>
> United States v. Bear Killer, supra, at 1259.

[But see Dempsey v. State, 355 A.2d 455, 460-63 (Md. 1976), holding that the trial court's disclosure to the jury that he has found a confession voluntary is improper, but declining to hold that the error is of constitutional dimension.]

Under Florida law the state has the burden of proving, by a preponderance of the evidence, that a confession was freely and voluntarily given. Peterson v. State, 382 So.2d 701, 702 (Fla. 1980); McDole v. State, 283 So.2d 553, 554 (Fla. 1973); see Lego v. Twomey, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1977). Therefore, as recognized in Bear Killer, the practice of informing the jury of the court's finding of voluntariness, approved in Florida by the state Supreme Court in the instant decision, will carry the dual consequences of (1) improperly influencing the jury's determination of the reliability of a confession, and (2) lightening the state's burden of proving guilt beyond a reasonable doubt.

The appellate court in Bear Killer held that the instruction which advised the jury of the trial court's finding of voluntariness "should not have been given and is not to be given in the future." United States v. Bear Killer, supra, at 1259. However, since that court had not previously spoken on the matter, it considered whether, upon review of the entire proceedings, the

error was harmless, and concluded that it was. A comparison between Bear Killer and the instant case presents some interesting contrasts on this point. In Bear Killer, the trial court stated expressly in its instruction that its finding of voluntariness was relevant only to admissibility and that the weight to be given the statements on the issue of innocence or guilt was solely for the jury. This instruction "mitigated the inference that voluntary statements are also truthful statements." United States v. Bear Killer, supra, at 1259. See also United States v. Standing Soldier, 538 F.2d 196, 203-04 (8th Cir. 1976); United States v. Fayette, 388 F.2d 728, 735-36 n.4 (2nd Cir. 1968). In the present case, the trial court failed to give the jury any instruction concerning its role in evaluating the weight or credibility of a confession. See United States v. Barry, supra, at 345-48 [holding that it was fundamental error, under 18 U.S.C. § 3501(a), for trial court to fail to instruct the jury as to the nature of its role in evaluating a confession, and emphasing that "the jurors are all too apt to conclude that the judge has made a binding determination that the confession was in fact and law voluntary or, perhaps more serious, true."]

In Bear Killer, the proof included an eyewitness account of the crime and corrobative testimony as to Bear Killer's intent to shoot the victim. In the present case, the evidence aside from petitioner's statements was circumstantial at best, and the element of premeditation was established solely by the confession. See Smith v. State, supra, at 898. In Bear Killer, the government sought a conviction of second degree murder, but the jury exercised its independent judgment and returned a verdict of guilty of the lesser offense of involuntary manslaughter. In the instant case, the state asked the jury to convict petitioner of first degree murder and to recommend the death penalty, and the jury did so. In Bear Killer, as here, there was no evidence that the statements were the product of coercion.

Most significantly, aside from the question of whether the Florida Supreme Court could properly have concluded that the trial court's disclosure to the jury of his voluntariness finding was harmless error or non-fundamental error,[1] the fact remains that the Florida Supreme Court did not do so, but held instead that such disclosure was perfectly proper. On motion for rehearing, petitioner pointed out to the Court that the effect of such a holding, as precedent, will be to permit and possibly encourage trial courts to inform the jury of a ruling that a confession was freely and voluntarily made, even in cases in which the voluntariness of the confession is hotly disputed. (See Appendix B, p. 7). In Lego v. Twomey, supra, 404 U.S. at 485-86, 30 L.Ed. 2d at 625-26, this Court said:

> Nothing in [Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964)] questioned the province or capacity of juries to assess the truthfulness of confessions. Nothing in that opinion took from the jury any evidence relating to the accuracy or weight of confessions admitted into evidence. A defendant has been as free since Jackson as he was before to familiarize a jury with the circumstances that attend the taking of his confession including facts bearing upon its weight and voluntariness. In like measure, of course, juries have been at liberty to disregard confessions that are insufficiently corrobated or otherwise deemed unworthy of belief.

See also United States v. Raddatz, 447 U.S. 667, 678, 100 S.Ct. 2406, 65 L.Ed.2d 424, 435 (1980); Kagebein v. State, 496 SW.2d 435, 440 (Ark. 1973).

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[1] The Florida Supreme Court did not rely on a contemporaneous objection rule with respect to the trial court's advising the jury of his finding that petitioner's confession was voluntary. The Court addressed the merits and held that such disclosure was not error. Consequently, federal review of the constitutional validity of the state court's holding is not barred. Washington v. Watkins, 655 F.2d 1346, 1368 (5th Cir. 1981); Braxton v. Estelle, 641 F.2d 392, 394 (5th Cir. 1981); Moran v. Estelle, 607 F.2d 1140, 1141-42 (5th Cir. 1979); see County Court of Ulster County v. Allen, 442 U.S. 140, 154, 99 S.Ct. 2213, 2223, 60 L.Ed.2d 777 (1979); Francis v. Henderson, 425 U.S. 536, 542, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976).

Lego v. Twomey, supra, held that judging the admissibility of a confession by the preponderance of the evidence did not violate the principle, expressed in In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), that the due process clause protects an accused in a criminal prosecution against a conviction except upon proof beyond a reasonable doubt. Significantly, Lego did not challenge the constitutionality of the standard by which the jury was instructed to decide his guilt or innocence. Lego v. Twomey, supra, 404 U.S. at 487, 30 L.Ed.2d at 626. Where, as here and as in future trials in which the Florida Supreme Court's precedent may be followed, the trial court's finding of voluntariness (made by a preponderance of the evidence) is conveyed to the jury as a finding of fact, the jury's ability to independently determine the reliability of the confession is compromised, and to the extent that the jury accepts the court's announced finding, the state's burden of proof is lightened. United States v. Bear Killer, supra. Where, as here, the jury is not even instructed that it has any role at all in determining the weight or credibility to be given the confession, the problem is greatly exacerbated. In this capital case, in which the only evidence of premeditation was supplied by the confessions, the jury was not only left entirely to its own devices in considering the confessions as in United States v. Barry, supra, but the trial court affirmatively stated to the jury that he had found the confessions voluntary. Under these circumstances, the jury had no reason to believe that the confessions could be anything other than conclusive; in effect, a "guilty plea in slow motion."

The issue presented here is essentially the reverse of that resolved in Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). This Court there held that due process requires a separate determination of of the voluntariness of a confession, uninfluenced by consideration of its reliability. The Court perceived the danger that matters pertaining to guilt

would distort the jury's finding of fact as to voluntariness. Under the precedent set forth by the Florida Supreme Court in the present case, the trial court's announcement to the jury that he has found a confession voluntary will distort the jury's assessment of the reliability of the confession, and the weight to be accorded the confession.

This Court should grant certiorari in the present case because petitioner's first degree murder conviction and sentence of death were obtained pursuant to constitutional error, in that the trial court informed the jury that he had found petitioner's confession to be voluntary, and because the Florida Supreme Court's express approval of this practice ensures that the error will be a recurring one.

CONCLUSION

WHEREFORE, the petition for writ of certiorari should be granted.

Respectfully submitted,

Steven L Bolotin

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ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Petition for Writ of Certiorari to the Supreme Court of Florida has been furnished by U.S. mail to the Honorable Alexander L. Stevas, Clerk of the United States Supreme Court, First and Maryland Avenue, Northeast, Washington, D.C. 20543; Mr. Jimmy Lee Smith, #035167, Post Office Box 747, Starke, Florida 32091; and by hand-delivery to the Honorable Sid White, Clerk of the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida; and the Honorable Jim Smith, Attorney General, The Capitol, Tallahassee, Florida; on this 24th day of March, 1982.

Steven L Bolotin

STEVEN L. BOLOTIN

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JIMMY LEE SMITH,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

APPENDIX

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been afforded ample opportunity to present evidence in mitigation in the original sentencing proceeding. The same reasoning applies here.

[3] Defendant's third point is equally unavailing. The trial court found that the capital felony was committed while the defendant was engaged in the commission of a robbery and also that it was committed for pecuniary gain. In its finding concerning the "pecuniary gain" circumstance, the court specifically stated that it was considered in conjunction with "robbery" circumstance. This is not contrary to the dictates of *Provence v. State*, 337 So.2d 783 (Fla.1976), *cert. denied*, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977), wherein we held that in all robbery-murders only one of these two aggravating circumstances can be found. We assume that the judge had *Provence* in mind when he specifically considered these two circumstances in conjunction. The word "conjunction" itself connotes a joining together to form one. While it may have been better practice to omit one of the factors completely in deference to the other, we cannot say that failure to do so is error.

[4] Defendant's last point concerning the presentence investigation report is without merit. The trial court is entitled by Rule 3.710, Florida Rules of Criminal Procedure, to draw its own conclusion from information in the report in capital cases. *Swan v. State*, 322 So.2d 485 (Fla.1975). In accordance with the dictates of *Gardner, supra*, the defendant was provided an opportunity to rebut.

Accordingly, the sentence of death is hereby affirmed.

It is so ordered.

SUNDBERG, C. J., and BOYD, OVERTON, ALDERMAN and McDONALD, JJ., concur.

Jimmy Lee SMITH, Appellant,

v.

STATE of Florida, Appellee.

No. 55961.

Supreme Court of Florida.

Nov. 12, 1981.

Rehearing Denied Jan. 28, 1982.

Defendant was convicted in the Circuit Court, Jackson County, Robert L. McCrary, Jr., J., of first-degree murder and sentenced to death. Appeal was taken. The Supreme Court, Adkins, J., held that: (1) the trial court did not improperly comment on the weight of confession evidence; (2) although the trial court failed to instruct the jury on weight to be given the defendant's confessions, that error did not warrant new trial; (3) the defendant waived any claim of error on the grounds that a complete record of the proceeding below was not available when it was his counsel that instructed the court reporter not to report his final argument; (4) the death penalty statute does not violate the Constitution by attempting to govern practice and procedure; (5) defendant was not entitled to new trial on the ground of alleged mental deficiency; (6) the exclusion of jurors who expressed opposition to the death penalty was proper; (7) trial court did not err by allowing the defendant to waive representation by counsel at sentencing phase of his trial; (8) aggravating and mitigating circumstances were properly considered; and (9) when there were two aggravating circumstances, even if one was not supported by evidence, that would not justify reversal of the sentence.

Affirmed.

Alderman, J., concurred specially with an opinion in which Boyd, J., concurred.

Sundberg, C. J., dissented.

1. Criminal Law ⇐656(9)

In murder prosecution, comments made by trial court that statement was freely and

voluntarily given by defendant made at various times during proceedings were not improper comment on weight of confession evidence during course of trial, since trial judge was making, with unmistakable clarity, finding for record that defendant's confessions were voluntarily made. U.S.C.A. Const.Amends. 5, 14; West's F.S.A.Const. Art. 1, § 9.

2. Criminal Law ⇐1173.2(8)

In murder prosecution, although trial court erred in failing to instruct jury on weight to be given defendant's confessions, that error did not warrant new trial where there was other evidence upon which conviction could be based.

3. Criminal Law ⇐1038.2, 1038.3

Trial court's failure to instruct jury on weight to be given defendant's confessions in murder prosecution was not fundamental error, cognizable for first time on appeal, in light of defendant's failure to request that instructions be given jury and to object when court failed to do so.

4. Criminal Law ⇐660

It was not necessary to vacate and remand murder conviction and imposition of death penalty, for failure to record defense counsel's closing argument at guilt phase of trial where defense counsel instructed court reporter not to report final argument, in that right to complete review was waived by such instruction.

5. Criminal Law ⇐1206(1)

Death penalty statute does not violate Florida Constitution by attempting to govern practice and procedure. West's F.S.A. § 921.141; West's F.S.A.Const.Art. 5, § 2(a).

6. Criminal Law ⇐1189

In murder prosecution, alleged evidence of mental deficiency on part of defendant did not compel new trial in interest of justice where findings of psychologists were considered by judge and jury and, although psychologists recommended that defendant undergo further tests, he specifically declined to do so.

7. Homicide ⇐348

In murder prosecution, psychological findings were not so internally inconsistent as to require reversal of imposition of death penalty.

8. Jury ⇐108

Three jurors who expressed opposition to death penalty were properly excused for cause in murder prosecution in light of testimony of each juror that under no circumstances would he vote to put person to death. U.S.C.A.Const.Amend. 6.

9. Criminal Law ⇐641.4(1)

Self-representation by defendant in criminal proceedings is not per se improper. U.S.C.A.Const.Amend. 6.

10. Criminal Law ⇐641.4(2)

Waiver of one's right to counsel must be intelligent and knowing relinquishment of such representation. U.S.C.A.Const. Amend. 6.

11. Criminal Law ⇐641.4(4)

In murder prosecution, trial court did not err by allowing defendant to waive representation by counsel at sentencing phase of his trial where defendant was closely questioned concerning his desire to make closing argument himself, he was warned of dangers of what he was doing and discouraged from doing so. U.S.C.A. Const.Amend. 6.

12. Homicide ⇐354

In murder prosecution, trial court did not err in sentencing defendant to death penalty by considering defendant's uncorroborated confessions to various crimes when there was no showing of corpus delicti for any prior offenses in order to negate otherwise applicable mitigating circumstance of lack of significant history. West's F.S.A. §§ 921.141, 921.141(6)(a).

13. Criminal Law ⇐1208(1)

Although consideration of all mitigating circumstances is required when death penalty is imposed, decision of whether particular mitigating circumstance is proven and weight to be given to it rest with judge and jury. West's F.S.A. § 921.141; U.S.C.

A.Const.Amends. 5, 14; West's F.S.A.Const. Art. 1, § 9.

14. Homicide ⇐354

In homicide prosecution, trial court did not err in sentencing by refusing to find as mitigating circumstances that defendant was under influence of extreme mental or emotional disturbance and/or that his capacity to appreciate criminality of his conduct or to conform his conduct to requirements of law was substantially impaired. West's F.S.A. § 921.141(6)(b, f).

15. Homicide ⇐354

In murder prosecution, even if evidence was insufficient to prove that defendant murdered second victim to hinder law enforcement, imposition of death penalty would be justified in light of proper finding of aggravating circumstance of heinous, atrocious, and cruel manner of killing. West's F.S.A. § 921.141.

Michael M. Corin and John D. C. Newton, II, Asst. Public Defenders, Tallahassee, for appellant.

Jim Smith, Atty. Gen. and Carolyn M. Snurkowski, Asst. Atty. Gen., Tallahassee, for appellee.

ADKINS, Justice.

Appellant, Jimmy Lee Smith, was convicted of the first-degree murders of Bonnie Ward and her twelve-year-old daughter, Donna Strickland. The trial judge imposed the death sentence in accordance with the jury's advisory sentence recommendation. We have jurisdiction. Art. V, § 3(b)(1), Fla.Const.

Appellant had spent the night before the murders as a guest in Mrs. Ward's home, and during the course of the evening both of his victims had spoken disparagingly of his girlfriend and her mother. Appellant's girlfriend was referred to as a whore and her mother's childrearing abilities criticized. On the day of the murders, appellant rode with Mrs. Ward, her three-year-old son, two-year-old daughter, and Donna to run several errands. During this trip, his girlfriend and her family were again criticized, and at that time appellant evidently decided to kill Mrs. Ward and Donna. On the way home from the errands, Mrs. Ward complied with appellant's request that she drive down a deserted country road to a spot where he claimed to have hidden a bundle of clothing which he wished to retrieve. After arriving at the spot, appellant ordered the children to stay in the car and forced Mrs. Ward, who by then realized that the request was a ruse, over her protestations and pleas, to accompany him on foot around a bend in the road. Once he thought that they were out of the sight of the children in the car, appellant began choking Mrs. Ward, exhorting her to "Die, Bitch." After Mrs. Ward had lost consciousness, Donna, who had left the car to look for the two adults, came upon the scene, whereupon appellant grabbed and began choking her also. Encountering difficulty in choking Donna with his hands, appellant held her by the neck with one hand and with the other took from his pocket a piece of cord which he then used to choke her.

After Donna lost consciousness, appellant undressed his still-living victims and stabbed each repeatedly in the chest, inflicting multiple wounds on both. Whatever it was that drove him still not satisfied, he proceeded to slit Mrs. Ward's throat and to cut open Donna's chest and look at her heart. Once he finished, appellant wrapped the bodies in blankets, left them in the brush, and drove the two younger children home, where he fed them and put them to bed. He was picked up the next day by an officer who saw him hitchhiking.

Appellant now asks this Court to order a new trial or, at least, a new sentencing hearing to remedy the errors which he contends occurred during his trial. We address the issues on appeal in the order in which he raises them.

First, appellant contends that he was denied due process of law and equal protection of the laws within the meaning of the Fifth and Fourteenth Amendments to the United States Constitution and article I,

section 9, of the Florida Constitution. In support thereof, he asserts that the trial court failed to properly instruct the jury on the weight to be given his confessions, and instead improperly commented thereon as evidence during the trial.

[1] We do not agree with appellant's argument that the trial court improperly commented on the weight of the confession evidence during the course of the trial. The comments complained of are the following, made at various times during the proceedings:

> The Court has ruled that the statement has been freely and voluntarily given by the Defendant, Jimmy Lee Smith, and admitted into evidence. It will be for your consideration at this time.
>
> • • • • • •
>
> The Court will rule that this statement was freely and voluntarily given. It will be admitted into evidence at this time.
>
> • • • • • •
>
> The Court will rule that that statement was freely and voluntarily given and will now be admitted into evidence.

We see the statements as attempts to comply with the requirement expressed in *Sims v. Georgia*, 385 U.S. 538, 87 S.Ct. 639, 17 L.Ed.2d 593 (1967), that the trial court clearly indicate, in the record, its conclusion that any confession admitted into evidence was voluntarily made:

> [I]t is not for the jury to make the primary determination of voluntariness. Although the judge need not make formal findings of fact or write an opinion, his conclusion that the confession is voluntary must appear from the record with *unmistakable clarity*.

Id. at 544, 87 S.Ct. at 643.

Referring to the same topic, this Court stated as follows:

> The requirement of the Fourteenth Amendment is that the trial judge make a determination that a confession was freely and voluntarily given before he allows it to be considered by a jury. A specific finding of voluntariness is necessary to ensure that a judge has properly met this requirement.

McDole v. State, 283 So.2d 553, 554 (Fla. 1973) (citations omitted).

The judge in the case *sub judice* was doing just that: making, with unmistakable clarity, a finding for the record that appellant's confessions were voluntarily made. His comments, therefore, were not improper.

[2] Appellant's other argument, that the court failed to instruct the jury on the weight to be given his confessions, is a valid point. We do not agree, however, that the error warrants a new trial. Appellant correctly states that the "law of the case" upon which the judge must charge the jury includes the weight to be given confessions. *See* § 918.10(1), Fla.Stat. (1977); Fla.R. Crim.P. 3.390(a); *Harrison v. State*, 149 Fla. 365, 5 So.2d 703 (1942). Appellant then cites several cases in which failure to so instruct the jury was found to be grounds for reversal and award of a new trial. The cases cited are not, however, on "all-fours" with the case at hand.

In *Harrison v. State* the defendant was never placed on the stand and never testified before the jury. It was acknowledged that there could have been no conviction without the confession, and defendant's counsel objected to the admission into evidence of the confession. In its decision, this Court held that the trial court had erred by not instructing the jury on the law of the case because it had a duty to do so "*under the circumstances of this case.*" *Id.* 5 So.2d 707 (emphasis added).

Brown v. State, 124 So.2d 481 (Fla.1960), which was also cited by appellant and which concerned the propriety of jury instructions on degrees of homicide, simply cited *Harrison* as an example of how failure to advise the jury on the weight to be given a confession could be fundamental error.

Bunn v. State, 363 So.2d 16 (Fla.3d DCA 1978), *cert. denied*, 368 So.2d 1373 (Fla. 1979), addressed the propriety of a trial court's refusal to give the jury instructions regarding evaluation of certain admissions which the defendant had made. The dis-

trict court reversed the conviction, emphasizing that a request for instructions had been made:

> [T]he failure of the trial court, *pursuant to appellant's request* for such an instruction prior to the time the jury retired, to give either the Florida Standard Jury Instruction (criminal) 2.13(i) or another appropriate instruction constituted reversible error.

Id. at 17 (emphasis added).

The case *sub judice* is distinguishable from those cited by appellant. The state did not rely entirely on appellant's confession to obtain a conviction. There was evidence presented, other than appellant's confession, upon which the conviction could be based. On Monday morning Bonnie Ward, Donna, and the two small children were in the Ward vehicle with defendant. They went to a hospital and visited another daughter, Dana, at about 11:30 a.m. Bonnie Ward was wearing her watch.

In mid-afternoon defendant went to a bank and attempted to cash a check. He was alone in Bonnie's automobile. When a policeman approached, defendant fled in the car. After a high speed chase, he eluded the officer.

On Tuesday defendant was arrested while hitchhiking. He had abandoned the vehicle, but had a knife and Bonnie's watch in his possession.

On Wednesday the small child was able to communicate with the officers so that they were led to the scene of the crime. This evidence was sufficient to show, beyond a reasonable doubt, that defendant was with the victims at the time of the murder. This, considered with the theft of the watch, possession of a knife suitable for use in committing the homicides, and the flight of the defendant, amounts to clear proof of the guilt of defendant.

We have held that where there exists other evidence, in addition to a confession, sufficient to sustain a conviction, failure by a court to, of its own motion, charge a jury regarding the consideration to be given said confession is not error requiring a new trial. *See Brunke v. State*, 160 Fla. 43, 33 So.2d 226 (Fla.1948).

Nor contrary to the cited cases, does there seem to be any reason to doubt the validity and voluntariness of appellant's confession. During the sentencing phase he personally addressed the jury, admitted to having committed the murders, and asked for imposition of the death penalty.

[3] It also bears note that appellant did not request that instructions be given the jury and did not object when the court failed to do so. In the cases cited, either a request for instructions was made or an objection raised to the absence thereof.

We therefore do not find the trial court's failure to instruct the jury regarding appellant's confessions to be "fundamental error," cognizable for the first time on appeal and requiring reversal of the trial court's decision. Unlike the cited cases, whatever error that may have occurred here was harmless error, and the circumstances of this case do not warrant a new trial as a result thereof.

[4] Appellant next argues that because a complete record of the proceeding below is not available for review by this Court (appellant's counsel's closing argument at the guilt phase of the trial was not recorded), the decision should be vacated and remanded. We decline to do so because it was appellant's counsel that instructed the court reporter not to report his final argument. Clearly, had the appellant been deprived the opportunity of a complete review through no fault of his own, there would be precedent for vacating the trial court's decision. *Delap v. State*, 350 So.2d 462 (Fla. 1977). But the right to review by an appellate court of the whole record may be relinquished, hence, our observation in *Delap* that "*[i]n the absence of a waiver*, the defendant has a right to complete review." *Id.* at 463, n. 1. (emphasis added). The right to a complete review here was waived when appellant's counsel instructed the court reporter not to record his closing argument, and appellant is not entitled to a new trial on the basis of the reporter's compliance with those instructions.

On the same point, appellant also argues that Rule 2.070(b), Florida Rules of Judicial Administration, mandates vacation of the trial court's decision. That rule provides:

> (b) *Record* When trial proceedings are being reported, no part of the proceedings shall be omitted unless all of the parties agree to do so and the court approves the agreement.

While there is no showing that the parties agreed to omit recordation of appellant's counsel's closing argument, or that the court approved of such, it was, nevertheless, appellant's counsel that instructed the court reporter not to record his closing argument, and in the absence of fundamental error appellant may not now raise the matter on appeal.

[5] Contrary to appellant's argument in his third point on appeal, we have held that section 921.141, Florida Statutes, does not violate the requirements of article V, section 2(a), Florida Constitution, by attempting to govern practice and procedure. *See Dobbert v. State*, 375 So.2d 1069 (Fla.1979), *cert. denied*, 447 U.S. 912, 100 S.Ct. 3000, 64 L.Ed.2d 862 (1980).

[6] We are not convinced, as appellant next contends, that heretofore unconsidered evidence of mental deficiencies on his part compels a new trial "in the interest of justice." Appellant was examined and tested by two psychologists whose findings were then considered by the judge and jury. Although the psychologists recommended that appellant undergo further tests, he specifically declined to do so, and, at the sentencing portion of his trial, tendered no evidence regarding a possible mental deficiency.

[7] Furthermore, despite appellant's contention to the contrary, the psychological findings which were considered are not so internally inconsistent as to be almost useless. The psychological report stated, in part:

> Even if an organic disorder were found to be present, we feel that it would not minimize the long standing maladaptive features of his personality nor would it render him legally insane. The critical aspect is that Jimmy has a chronic history of difficulty in being aware of [,] accepting [,] and dealing with his feelings of anger. In fact, the personality evolution points to a profound deficiency in character development and the associated problems in impulse control. Should, however, an organic disorder be detected, we would be willing to render an opinion regarding possible mitigating circumstances.

The doctors' report is unequivocal; appellant was not legally insane.

The supplemental report which appellant now seeks to have considered was never before the trial court because at that stage of the proceedings appellant refused to undergo further testing. Now he seeks to undo his prior action. Appellant charted his own course, willingly and knowingly, and the psychological report weighed by the judge and jury was definite, proper and consistent. There was no error.

[8] Appellant's next point on appeal is that the exclusion of three jurors who expressed opposition to the death penalty violated his Sixth Amendment right to a jury chosen from a random cross-section of the community. More specifically, appellant contends that the excusal of the three did not comport with the United States Supreme Court's ruling in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). In light of the testimony by each of the jurors in question that under no circumstances would he vote to put a person to death, we are of the opinion that the *Witherspoon* holding was complied with, and that they were properly excused for cause. *See Fleming v. State*, 374 So.2d 954 (Fla.1979); *Foster v. State*, 369 So.2d 928 (Fla.), *cert. denied*, 444 U.S. 885, 100 S.Ct. 178, 62 L.Ed.2d 116 (1979); and *Jackson v. State*, 366 So.2d 752 (Fla.1978), *cert. denied*, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979).

[9, 10] Appellant's sixth point on appeal, that the trial court erred by allowing him to waive representation by counsel at the sentencing phase of his trial, is also without

merit. At the outset, we note that self-representation by a defendant in a criminal proceeding is not per se improper. "[I]n the absence of unusual circumstances an accused who is mentally competent and sui juris has the right to conduct his own defense without counsel by virtue of Section 11, Declaration of Rights, Florida Constitution." *State v. Capetta*, 216 So.2d 749, 750 (Fla.1968), *cert. denied*, 394 U.S. 1008, 89 S.Ct. 1610, 22 L.Ed.2d 787 (1969). The waiver of one's right to counsel must, however, be an intelligent and knowing relinquishment of such representation. This Court, when faced with a question regarding the propriety of such a waiver in *Goode v. State*, 365 So.2d 381 (Fla.1978), *cert. denied*, 441 U.S. 967, 99 S.Ct. 2419, 60 L.Ed.2d 1074 (1979), cited the decision of the United States Supreme Court in *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), which noted:

> Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that record will establish that "he knows what he is doing and his choice is made with eyes open."
>
> Here, weeks before trial, Faretta clearly and unequivocally declared to the trial judge that he wanted to represent himself and did not want counsel. The record affirmatively shows that Faretta was literate, competent, and understanding and that he was voluntarily exercising his informed free will. The trial judge had warned Faretta that he thought it was a mistake not to accept the assistance of counsel, and that Faretta would be required to follow all the "ground rules" of trial procedure. We need make no assessment of how well or poorly Faretta had mastered the intricacies of the hearsay rule and the California code provisions that govern challenges of potential jurors on *voir dire*. For his technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself.

Id. at 835–36, 95 S.Ct. at 2541. (Citation and footnotes omitted.)

[11] Applying the *Faretta* criteria in the case *sub judice*, we do not find appellant's waiver of counsel to have been improperly permitted. The record makes it quite clear that appellant wanted to make the closing argument at the sentencing phase of his trial himself rather than have his attorney do so. It also makes it clear that he was literate, competent, and understanding. He was apprised of the danger of what he was doing, of the seriousness thereof, and that a very real result might be imposition of the death penalty. He was warned that the prosecutor would not "back up," regardless of who made the closing argument for the defense, and would vigorously seek the death penalty. He was strongly urged to allow his attorney to make the closing argument, but insisted on doing so himself.

We need not inquire whether appellant knew all of the specifics regarding aggravating and mitigating circumstances and the like. Paraphrasing the opinion in *Faretta*, we need make no assessment of how well or poorly appellant mastered the intricacies of the sentencing process, for his technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself. The trial judge questioned appellant closely concerning his desire to make the closing argument himself. Appellant was warned of the dangers of what he was doing and discouraged from doing so. He was not lightly allowed to follow the course which he chose. The court fulfilled its obligation, as enunciated in *Faretta*, and no reversible error occurred.

[12] In the seventh point on appeal, appellant contends that the trial court erred in sentencing by considering his uncorroborated confessions to various crimes when there was "no showing of a corpus delicti for any prior offenses." Appellant argues that the trial judge's finding of a significant history of prior criminal activity, when there was no evidence of such other than statements made by appellant, violated the

corpus delicti principle. However, that principle, which requires some independent proof of a crime other than a confession before one may be convicted, does *not* mandate the reversal suggested, for the following reasons.

Section 921.141, Florida Statutes (1979), lists the aggravating and mitigating circumstances to be considered in determining an appropriate sentence in a capital case. Section 921.141(6)(a) provides that lack of a significant history of prior criminal activity is to be considered a mitigating factor. Noting that *aggravating* circumstances must be proven beyond a reasonable doubt, *State v. Dixon*, 283 So.2d 1 (Fla.1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), and the particular need for accuracy when a life is at stake, appellant argues that there must be competent, independent proof of significant prior criminal activity in order to negate the *mitigating* circumstance established by section 921.141(6)(a). We have, however, specifically held otherwise.

In *Washington v. State*, 362 So.2d 658 (Fla.1978), *cert. denied*, 441 U.S. 937, 99 S.Ct. 2063, 60 L.Ed.2d 666 (1979), a death sentence was appealed from in part on the basis of an allegedly improper refusal by the court to consider lack of a significant history of prior criminal activity as a mitigating circumstance. The trial court had refused to recognize the alleged mitigating circumstance because the appellant had carried on a course of burglaries, had stolen property for a significant period of time, and had confessed and testified to such in open court. The appellant asserted that the trial court had acted improperly, that on the basis of our decision in *Provence v. State*, 337 So.2d 783 (Fla.1976), *cert. denied*, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977), previous convictions are required to negate section 921.141(6)(a). We upheld the trial court, however, observing:

> [Appellant] misconstrues the holding of *Provence*. That case construed Section 921.141(5)(b) which requires previous *conviction* of another capital felony involving the use or threat of violence.... Section 921.141(6)(a) makes no reference to *conviction* and, hence, *Provence* has no application to the instant case.

Washington, at 666–67.

Thus in the case *sub judice*, as in *Washington*, the trial court, on the basis of confessions made by the appellant, properly found that the appellant had a significant history of prior criminal activity which negated the otherwise applicable mitigating circumstance of section 921.141(6)(a).

[13] Nor, proceeding to appellant's eighth point on appeal, did the trial court err in sentencing by refusing to find as mitigating circumstances that the appellant was under the influence of extreme mental or emotional disturbance and/or that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. *See* sections 921.141(6)(b) and (f). Although consideration of all mitigating circumstances is required by the United States Constitution, *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the decision of whether a particular mitigating circumstance in sentencing is proven and the weight to be given it rest with the judge and jury. *Lucas v. State*, 376 So.2d 1149 (Fla.1979).

[14] The appellant cites several cases in which the mitigating circumstances of sections 921.141(6)(b) and/or (f) were applied as a result of evidence pertaining to the defendant's state of mind. In two of these cases, *Burch v. State*, 343 So.2d 831 (Fla. 1977), and *Shue v. State*, 366 So.2d 387 (Fla.1978), we reversed death sentences because the trial judges had ignored the juries' recommendations of a life sentence. Although both cases demonstrate that evidence regarding a defendant's mental state may be taken in mitigation, their greater emphasis seems to be on the deference which is to be accorded a jury's sentencing recommendation. The jury here recommended imposition of the death penalty.

Also cited is our decision in *Huckaby v. State*, 343 So.2d 29 (Fla.), *cert. denied*, 434 U.S. 920, 98 S.Ct. 393, 54 L.Ed.2d 276 (1977),

in which we vacated a death sentence for failure by the trial court to recognize the existence of certain mitigating circumstances. Explaining why the lower court ought to have recognized the mitigating circumstances, we noted:

> The trial judge ignored every aspect of the medical testimony in this case when he found that no mitigating circumstances existed. There was almost total agreement on Huckaby's mental illness and its controlling influence on him. Although the defense was unable to prove legal insanity, it amply showed that Huckaby's mental illness was a motivating factor in the commission of the crimes for which he was convicted. Our review of the record shows that the capital felony involved in this case was committed while Huckaby was under the influence of extreme mental or emotional disturbance, and that while he may have comprehended the difference between right and wrong his capacity to appreciate the criminality of his conduct and to conform it to the law was substantially impaired. These findings constitute two mitigating circumstances which should have been weighed in determining his sentence.

Id. at 33–34.

While the situation in *Huckaby* warranted an invasion of the trial court's domain, such is not the case here. The trial court here did not ignore every aspect of the medical testimony regarding the appellant; rather, it found that the medical testimony simply did not compel application of a mitigating factor in sentencing. Unlike the court in *Huckaby*, the trial court did not improperly refuse to recognize certain mitigating circumstances; rather, it considered the evidence presented regarding the defendant's mental state and then made its decision, which we are not to disturb unless absolutely required to do so.

Relevant to this situation is our decision in *Lucas v. State*, wherein we refused to interfere with the trial court's decision regarding mitigating circumstances, noting:

> Appellant next argues that the evidence supports the existence of at least two mitigating circumstances which the trial court failed to take into consideration. During the sentencing hearing, defense counsel produced a psychiatrist who testified that appellant knew right from wrong, but suffered from a sociopathic personality resulting in defective judgment. Other witnesses testified to appellant's abnormal appearance and behavior on the evening of the shooting. Appellant contends that this testimony proves that he was under extreme mental or emotional disturbance at the time of the commission of the offense (section 921.141(6)(b)) and could not appreciate the criminality of his conduct. (Section 921.141(6)(f)). In response, the state argues that it lies within the province of the trier of fact to weigh the evidence presented. We agree. The jury and the judge heard the testimony, and apparently concluded that the testimony should be given little or no weight in their decisions. We find nothing in the record which compels a different result.

376 So.2d at 1153–54.

In *Hargrave v. State*, 366 So.2d 1 (Fla. 1978), *cert. denied*, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979), we considered a similar question and held:

> Returning to appellant's argument that the trial judge erred in failing to find the mitigating circumstances delineated above, we respond that the jury and the judge could have resolved the evidence in favor of appellant's position, but neither was *compelled* to do so. We are not here dealing with a case where either the jury or the court considered matters it should not have considered or failed to consider matters it should have considered. Appellant simply disagrees with the force and effect given to the testimony of a psychologist and a psychiatrist at the sentencing hearing.... [T]he trial judge did not ignore or fail to consider the psychological evidence bearing on mitigation. Obviously, he and the jury were not persuaded that it provided a sound

basis for establishment of the statutory mitigating circumstances.

Id. at 5–6 (emphasis added).

Clearly then, we are not warranted to disturb the trial court's findings. There was nothing improper in the conclusions reached nor in the method by which they were reached. The decision was one within the domain of the judge and jury, and a reversal thereof is not justified simply because appellant draws a different conclusion from the testimony presented than did the jury.

[15] The final point raised on appeal by appellant is that the evidence presented was insufficient to prove that he murdered Donna Strickland to hinder law enforcement. He objects to the trial court's first finding of fact as to aggravating circumstances, which reads, in part:

> The capital felony charged in Count II of the Indictment was committed to disrupt or hinder the lawful exercise of a governmental function or the enforcement of laws.... The Court specifically finds that the defendant than killed Donna Lynn Strickland to keep her from testifying against him for the murder of Bonnie Myrle Ward which she saw the defendant commit.

Appellant suggests several reasons why the above finding is improper, but, because of the court's second finding we need not address the merits of appellant's argument.

In his second finding of fact as to aggravating circumstances, the trial judge found that the murders for which appellant was convicted were committed in an especially heinous, atrocious, and cruel manner. The finding also noted that the manner in which appellant cut open the chest of Donna Strickland was particularly heinous, atrocious, and cruel and that "even were there no other aggravating circumstances in this case, this circumstance alone warrants the imposition of the death penalty." Although we agree that appellant's action in cutting open his younger victim's chest was particularly loathsome and reprehensible, we are of the opinion that the more heinous, atrocious, and cruel aspect of the killings was the manner in which he strangled his victims. Appellant described how both women struggled, shook spasmodically and looked into his eyes as he choked them. Both strangulations were prime examples of the "conscienceless or pitiless crime which is unnecessarily torturous to the victim" which we have established as heinous, atrocious, and cruel. *See State v. Dixon*, at 9.

Discussion of the proper basis for finding the killings heinous, atrocious, and cruel aside, the important point is that the trial court found *two* aggravating circumstances. Thus even were we to rule that Donna's murder was not committed to keep her from testifying against appellant, there would remain the aggravating circumstance of the heinous, atrocious, and cruel manner of the killings, and the imposition of the death penalty herein would still be justified. As we noted in *Dixon*:

> When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided in Fla. Stat. § 921.141(7), F.S.A. [Now § 921.-141(6)]

Id. at 9. Because there are two aggravating circumstances, and no mitigating ones, the sentence of death would not have to be overturned even if we were to find the first aggravating circumstance improper. The second finding alone is sufficient basis for imposition of the death penalty. Consideration of the merits of the first finding would be for naught, and so we decline to do so.

In light of the foregoing, we find that the trial court's decision was proper. Accordingly, the conviction and sentence imposed by the trial court are affirmed.

It is so ordered.

BOYD, OVERTON and McDONALD, JJ., concur.

ALDERMAN, J., specially concurs with an opinion, with which BOYD, J., concurs.

SUNDBERG, C. J., dissents.

ALDERMAN, Justice, concurring specially.

Although I concur with the affirmance of the conviction and sentence and the rationale of the majority for this affirmance, I would not avoid the issue of whether the trial court properly found the aggravating circumstance that Smith murdered Donna Strickland to hinder law enforcement. The majority finds it unnecessary to resolve this question because there is at least one viable aggravating circumstance and no mitigating circumstances, and therefore under *State v. Dixon*, 283 So.2d 1 (Fla.1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), death is presumed to be the proper sentence.

In my view, the trial court properly found that Smith murdered Donna to hinder law enforcement. In its sentencing order, the trial court explains its justification for this finding:

> 1. The capital felony charged in Count II of the Indictment was committed to disrupt or hinder the lawful exercise of a governmental function or the enforcement of laws. The evidence shows that the defendant coolly and calmly lured Bonnie Myrle Ward and her twelve year old daughter, Donna Lynn Strickland, to drive their automobile down a lonely dirt road through the use of a lie that the defendant had clothing cached in said location which he needed to retrieve. The defendant then caused Bonnie Myrle Ward to leave the car with him and was in the process of killing her through the means charged in the Indictment when Donna Lynn Strickland attempted to come to the aid of her mother. The Court specifically finds that the defendant then killed Donna Lynn Strickland to keep her from testifying against him for the murder of Bonnie Myrle Ward which she saw the defendant commit.

Accordingly, I would find that the trial court properly found two aggravating circumstances.

BOYD, J., concurs.

Amos Lee KING, Jr., Appellant,

v.

STATE of Florida, Appellee.

No. 61406.

Supreme Court of Florida.

Dec. 2, 1981.

Defendant appealed from the denial by the Circuit Court, Pinellas County, John S. Andrews, J., of his motion for postconviction relief. The Supreme Court held that defendant was not denied effective assistance of counsel.

Affirmed.

Criminal Law ⇐641.13(2)

Where defendant's attorney did not make any single act of omission or commission that was substantial and serious deficiency measurably below that of competent counsel, even though only 11 days intervened between end of his previous case and defendant's trial during which most of preparation for defendant's case occurred, defendant was not denied effective assistance of counsel. West's F.S.A. Rules Crim. Proc., Rule 3.850.

Baya Harrison, III of Fuller, Johnson & Harrison, Tallahassee, for appellant.

Jim Smith, Atty. Gen., and Michael J. Kotler, Asst. Atty. Gen., Tampa, for appellee.

PER CURIAM.

This is an appeal from a final order of the Circuit Court of the Sixth Judicial Circuit in and for Pinellas County, dated November 13, 1981, denying King's motion for postconviction relief filed pursuant to Florida

IN THE SUPREME COURT OF FLORIDA

JIMMY LEE SMITH, :

Appellant, :

v. : CASE NO. 55,961

STATE OF FLORIDA, :

Appellee. :

_____ :

MOTION FOR REHEARING

COMES NOW the appellant, JIMMY LEE SMITH, pursuant to Rule 9.330(a) of the Florida Rules of Appellate Procedure, and moves this Court for rehearing in the above-styled case. As grounds therefor, appellant states:

1. In addressing the issue concerning the absence of any instruction to the jury on the weight to be given the defendant's confessions, this Court concluded that the trial court's failure to give such an instruction was error. However, the Court determined that this error did not require reversal, since there was neither a request for such an instruction nor an objection to the trial court's failure to give it. The Court distinguished Harrison v. State, 149 Fla. 365, 5 So.2d 703 (1942), in which absence of a jury instruction on the weight to be accorded a confession was held to be fundamental under the circumstances of that case, on the basis that here, unlike Harrison, there was sufficient evidence apart from the confessions to sustain the conviction. Appellant believes that, in reaching this conclusion, this Court may have misapprehended the nature of the independent evidence in this case.

2. In Harrison v. State, supra, at 707, it was noted that the conviction in that case "necessarily rest[ed] on the confession". The omitted charge on the weight to be given the confession was part of "the law of the case" (see Bunn v. State, 363 So.2d 16 (Fla. 3d DCA 1978)), and it was incumbent on the trial court to charge the jury accordingly, whether requested to do so or not. Harrison v. State, supra, at 707. An error of

this kind is fundamental where the prosecution depends entirely upon the confession as the basis for conviction. Hamilton v. State, 88 So.2d 606 (Fla. 1956). Thus, Harrison has been distinguished in a number of cases which hold that failure to instruct on the weight to be given a confession is not fundamental error when there exists evidence independent of the confession which would be sufficient to sustain the conviction. See Hamilton v. State, supra; Brunke v. State, 160 Fla. 43, 33 So.2d 226 (Fla. 1948); Miles v. State, 160 Fla. 423, 36 So.2d 182 (Fla. 1948); Sineffia v. State, 100 So.2d 937 (Fla. 1958); Brown v. State, 124 So.2d 481 (Fla. 1960); Robles v. State, 188 So.2d 789 (Fla. 1966); Kinchen v. State, 297 So.2d 341 (Fla. 3d DCA 1974). In the instant case, this Court found Harrison not to be controlling for this reason.

3. It has also been noted that the fact that Harrison v. State, supra, was a capital case provided a further basis for the conclusion of this Court that the omission of any instructions on the weight to be given a confession was fundamental error in that case. See Brunke v. State, supra; Miles v. State, supra. In Harrison

> the defendant had been sentenced to death, and upon a review of the evidence the court concluded that his conviction rested on his confession. Despite the fact that this testimony against himself was indispensable to a conviction, no charge was given with reference to the manner in which the confession should be received and considered by the jury. The importance of this omission is magnified in the light of Section 924.32(2) Florida Statutes, 1941, F.S.A., where the appellate court is admonished to review the evidence, in a case resulting in a sentence of death, "to determine if the interests of justice require a new trial, whether the sufficiency of the evidence is a ground of appeal or not".
>
> Miles v. State, supra, at 36 So.2d 184.

See Fla. R. App. P. 9.140(f), which includes the principle formerly expressed in Fla. Stat. §924.32(2). The instant case, like Harrison, is a capital case.

4. This Court in the instant case, wrote:

> The case sub judice is distinguishable from those cited by appellant. The state did not

> rely entirely on appellant's confession to obtain a conviction. There was evidence presented, other than appellant's confession, upon which the conviction could be based. On Monday morning Bonnie Ward, Donna, and the two small children were in the Ward vehicle with defendant. They went to a hospital and visited another daughter, Dana, at about 11:30 a.m. Bonnie Ward was wearing her watch.
>
> In mid-afternoon defendant went to a bank and attempted to cash a check. He was alone in Bonnie's automobile. When a policeman approached, defendant fled in the car. After a high speed chase, he eluded the officer.
>
> On Tuesday defendant was arrested while hitchhiking. He had abandoned the vehicle, but had a knife and Bonnie's watch in his possession.
>
> On Wednesday the small child was able to communicate with the officers so that they were led to the scene of the crime. This evidence was sufficient to show, beyond a reasonable doubt, that defendant was with the victims at the time of the murder. This, considered with the theft of the watch, possession of a knife suitable for use in committing the homicides, and the flight of the defendant, amounts to clear proof of the guilt of defendant.
>
> We have held that where there exits other evidence, in addition to a confession, sufficient to sustain a conviction, failure by a court to, of its own motion, charge a jury regarding the consideration to be given said confession is not error requiring a new trial. See Brunke v. State, 160 Fla. 43, 33 So.2d 226 (Fla. 1948).

5. In reaching this conclusion, appellant respectfully submits that this Court may have misapprehended or overlooked the fact that while the independent evidence detailed above would arguably have been sufficient circumstantial evidence to support a conviction of second degree murder, it would not have been sufficient to support a conviction of first degree murder. Yet appellant was convicted of first degree murder, solely on the basis of his confession. The jury received absolutely no guidance as to how to evaluate the confession; thus, for all intents and purposes, it was as conclusive as a guilty plea.

6. Aside from the confessions, the circumstantial evidence in this case would have been insufficient to establish premeditation. See Hall v. State, 403 So.2d 1319 (Fla. 1981). The

theft of the watch, possession of the knife, and flight upon approach of a police officer are all equally consistent with second degree murder. See McAffee v. United States, 105 F.2d 21,28 (D.C. Cir. 1939). The theft of the watch could not have supported the conviction on a felony murder theory, both because there was nothing to show whether the intent to take the watch was formulated at the time of the killing, cf. Gafford v. State, 387 So.2d 333 (Fla. 1980), and because there was no jury instruction on the definition or elements of robbery or any other potential underlying felony, see Vasil v. State, 374 So.2d 465 (Fla. 1979); State v. Jones, 377 So.2d 1163 (Fla. 1979).

7. Since, in the absence of the confession, the defendant could have been convicted of no more than second degree murder (and thus could not have been subject to the death penalty, see Harrison, Brunke, Miles, supra), the independant evidence was not sufficient to sustain the conviction. The prosecution relied entirely on the confessions to obatin a first degree murder conviction, and therefore it was fundamental error for the trial judge to fail to advise the jury on the weight to be given a confession, even though no such charge was requested. Brown v. State, supra, at 484.

8. In addition, the error in failing to instruct the jury on the weight to be given a confession was compounded by the trial court's statements, on three separate occasions, in the presence of the jury, that he found the confessions to have been freely and voluntarily given. A finding that a confession was freely and voluntarily given must be made by the trial court before the confession may be considered by the jury. As noted by this Court in the instant case, such a finding must appear on the record with unmistakable clarity. McDole v. State, 283 So.2d 553 (Fla. 1973); Peterson v. State, 382 So.2d 701 (Fla. 1980). Appellant respectfully suggests, however, that in concluding that it is proper for the trial court to announce his finding of voluntariness to the jury, this Court may have misapprehended the applicable legal principles.

9. Evidence regarding the voluntariness of a confession may be presented first to the trial judge, who determines admissibility, and then to the jury, which determines the weight to be accorded the confession considering, inter alia, the circumstances under which it was made. See Palmes v. State, 397 So.2d 648 (Fla. 1981). The initial inquiry into voluntariness, to determine admissibility, must be held in the absence of the jury. See Allen v. State, 239 So.2d 33 (Fla. 1st DCA 1970). Since the jury must also consider the voluntariness of the confession, among other factors and circumstances, in determining what weight to give it, it is inherently unfair to permit the jury's assessment to be influenced, if not effectively dictated, by the trial court's announced finding that he has found the confession voluntary. (This problem is even more pronounced in the instant case, since the jury was not even instructed as to what, if anything, its role was in determining the weight to be given the confession. The jury could easily and reasonably have believed that the trial court's finding of voluntariness was binding).

10. Several federal decision have expressly stated that the trial court's finding of voluntariness should not be disclosed to the jury. See United States v. Inman, 352 F.2d 954, 956 (4th Cir. 1965); Clifton v. United States, 371 F.2d 354,360 (D.C. Cir. 1965); United States v. Fayette, 388 F.2d 728,736 (2d Cir. 1968); United States v. Barry, 518 F.2d 342, 348 (2d Cir. 1975); United States v. Bear Killer, 534 F.2d 1253, 1259 (8th Cir. 1976) "Disclosure places upon the in-custody statements the imprimatur of the court which, it must be presumed, influences the jury". United States v. Bear Killer, supra, at 1259.

11. In United States v. Barry, supra, the trial court failed to instruct the jury to weigh the defendant's admissions in the light of all the surrounding circumstances. No request for such an instruction, or objection to failure to give it, was made. The jury was given a general admonition that it was to determine the facts, adjudicate credibility, and weigh the

evidence, but no specific reference to the confession was made. The appellate court held that, even in the absence of a proper objection, the jury must be instructed as to the precise nature of its role in considering a confession, and that failure to so charge is plain error. The court addressed the Government's contention that the standard "boiler plate" charge on credibility was sufficient as follows:

> But where, as here, such a general charge is not even supplemented by a limiting instruction at the time the evidence is introduced, the jurors are all too apt to conclude that the judge has made a binding determination that the confession was in fact and law voluntary or, perhaps more serious, true. We have previously held that the judge must not disclose to the jury his conclusions as to voluntariness. United States v. Fayette, 388 F.2d 728, 736 (2d Cir. 1968). And we must recognize that a judge's silence may under some circumstances have as much impact as his words.
>
> United States v. Barry, supra, at 347-48.

In the instant case, a capital case in which the only evidence of premeditation was supplied by the confessions, the jury was not only entirely left to its own devices in considering the confessions as in Barry, but also the trial court affirmatively stated to the jury that he had found the confessions voluntary. Under these circumstances, the jury had no reason to believe that the confessions could be anything other than conclusive. Each error was harmful; combined they were devastating.

12. The jury must be properly instructed on the weight to be given a confession not only because the confession may be involuntary, but also because, even if voluntary, it may be untrue or only partially true. See Palmes v. State, supra. In Smith v. United States, 348 U.S. 147, 153 (1954), quoted in Knight v. State, 420 So.2d 435 (Fla. 3d DCA 1981), it was observed:

> ...a long history of judicial experience with confessions and in the realization that sound law enforcement requires police investigation which extends beyond the words of the accused. Confessions may be unreliable because they are coerced or induced, and although separate doctrines exclude involuntary confession from consideration by the jury [citations omitted], further caution is warranted because the

> accused may be unable to establish the involuntary nature of his statements. Moreover, though a statement may not be 'involuntary' within the meaning of this exclusionary rule, still its reliability may be suspect if it is under the pressure of a police investigator - whose words may reflect the strain and confusion attending his predicament rather than a clear reflection of his past. Finally, the experience of the courts, the police and the medical profession recount a number of false confessions voluntarily made [citation omitted]. These are the considerations which justify a restriction on the power of the jury to convict, for this experience with confessions is not shared by the average juror.

Consequently, it is submitted that a complete failure to advise the jury on the weight to be given a confession, especially when coupled with a finding by the judge in the presence of the jury that the confession was freely and voluntarily made, cannot be harmless error. Again, it is emphasized that without the confessions, appellant could neither have been convicted of first degree murder nor sentenced to death.

13. Moreover, the Court in the instant case did not conclude that the trial court's disclosure to the jury of its finding of voluntariness was harmless or non-fundamental, but rather held that it was not error. The effect of such a holding, as precedent, would be to permit and possibly encourage trial judges to inform the jury of a ruling that a confession was freely and voluntarily made, even in cases in which the voluntariness of the confession is hotly disputed.

WHEREFORE, based upon the foregoing reasons and authorities, appellant respectfully requests that this Court grant his Motion for Rehearing, and thereafter reverse its decision to affirm his conviction.

Respectfully submitted,

Steven L. Bolotin

STEVEN L. BOLOTIN
Assistant Public Defender
Second Judicial Circuit
Post Office Box 671
Tallahassee, Florida 32302
(904)488-2458

Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been hand delivered to Ms. Carolyn Snurkowski, Assistant Attorney General, The Capitol, Tallahassee, Florida; and a copy mailed to Mr. Jimmy L. Smith, #035167, Florida State Prison, Post Office Box 747, Starke, Florida 32091, this 25 day of November, 1981.

Steven L. Bolotin

STEVEN L. BOLOTIN

Supreme Court of Florida

THURSDAY, JANUARY 28, 1982

JIMMY LEE SMITH,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 55,961

Circuit Court Nos. 78-200 & 78-201
(Jackson)

RECEIVED
PUBLIC DEFENDER
2nd JUDICIAL CIRCUIT

Upon consideration of the Motion for Rehearing filed in the above styled cause by attorney for Appellant,

IT IS ORDERED that said Motion be and the same is hereby denied.

ADKINS, BOYD, OVERTON, ALDERMAN and McDONALD, JJ., concur
SUNDBERG, C.J., dissents

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

By: Tanya Carroll
Deputy Clerk

TC
cc: Hon. Daun Crews, Clerk
Hon. Robert L. McCrary, Jr., Chief Judge

Steven L. Bolotin, Esquire
Carolyn Snurkowski, Esquire

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 14
Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

RECEIVED
MAR 26 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO 81-6437

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JIMMY LEE SMITH,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

JIMMY LEE SMITH, petitioner in the above-styled cause hereby moves this Court, by his undersigned counsel, for leave to proceed in forma pauperis and in support hereof shows as follows:

1. An affidavit signed by petitioner is attached hereto, wherein petitioner sets forth the fact that he is indigent and unable to pay or give security for the fees and costs attendant to this proceeding.

2. Petitioner was adjudged insolvent for the purpose of appeal in the Supreme Court of Florida and was represented there by appointed counsel.

WHEREFORE, it is respectfully requested that petitioner be permitted to proceed in forma pauperis in this matter.

Respectfully submitted,

Steven L Bolotin

STEVEN L. BOLOTIN
Assistant Public Defender
Second Judicial Circuit
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

COUNSEL FOR PETITIONER

(Member of the Bar of this Court)

RECEIVED
MAR 26 1982
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SUPREME COURT, U.S.

NO. 81-6437

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JIMMY LEE SMITH,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

I, JIMMY LEE SMITH, being duly sworn, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees and to proceed in forma pauperis:

1. I am the petitioner in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause; I own no real or personal property; I am incarcerated and receive no income from earnings.

3. I am unable to give security for said cause.

4. I believe that I am entitled to the redress I seek in said cause.

Jimmy Lee Smith
JIMMY LEE SMITH

STATE OF FLORIDA
COUNTY OF [illegible]

The foregoing affidavit of JIMMY LEE SMITH was subscribed and sworn to before me on this 15 day of March, 1982.

[illegible]
NOTARY PUBLIC, STATE OF FLORIDA

MY COMMISSION EXPIRES:

NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires Aug. 19, 1985

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion for Leave to Proceed in Forma Pauperis has been furnished by U.S. mail to the Honorable Alexander L. Stevas, Clerk of the United States Supreme Court, First and Maryland Avenue, Northeast, Washington, D.C. 20543; Mr. Jimmy Lee Smith, #035167, Post Office Box 747, Starke, Florida 32091; and by hand-delivery to Honorable Sid White, Clerk of the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida; and the Honorable Jim Smith, Attorney General, The Capitol, Tallahassee, Florida; on this 24th day of March, 1982.

Steven L Bolotin

STEVEN L. BOLOTIN

APR 26 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-6437

JIMMY LEE SMITH,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

RESPONSE TO

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF FLORIDA

JIM SMITH
ATTORNEY GENERAL

CAROLYN M. SNURKOWSKI
ASSISTANT ATTORNEY GENERAL

THE CAPITOL, 1502
TALLAHASSEE, FL 32301-8048
(904) 488-0290

COUNSEL FOR RESPONDENT

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. _____

JIMMY LEE SMITH,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

RESPONSE TO

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF FLORIDA

QUESTION PRESENTED

WHETHER THE FLORIDA SUPREME COURT'S AFFIRMANCE OF PETITIONER'S CONVICTION AND SENTENCE, IN WHICH IT APPROVED A PRACTICE WHEREIN THE TRIAL COURT SPECIFICALLY ADVISED THE JURY THAT HE HAD FOUND PETITIONER'S CONFESSION TO BE VOLUNTARY, VIOLATED PETITIONER'S RIGHT TO DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

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PRELIMINARY STATEMENT

Respondent accepts the Citation to Opinion Below, Jurisdiction, Constitutional and Statutory Provisions Involved, and the Statement of the Case found on pages 1 through 3 of Petitioner's Petition for Writ of Certiorari.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Petitioner asserted that the trial court erred on two grounds: (1) That the court "commented on the evidence" in that on three separate occasions the trial court stated:

> The Court has ruled that the statement has been freely and voluntarily given by the Defendant, Jimmy Lee Smith, and admitted into evidence. It will be for your consideration at this time. You may proceed.
>
> * * *
>
> The Court will rule that this statement was freely and voluntarily given. It will be admitted into evidence at this time.
>
> * * *
>
> The Court will rule that that statement was freely and voluntarily given and will now be admitted into evidence.

(R 406, 419, 436).

(2) That the trial court failed to instruct the jury on the weight to be given a confession. Smith v. State, 407 So.2d 894, 896-897 (Fla. 1981).

The Florida Supreme Court in addressing the first issue concluded that the trial court committed no error in that the court was attempting to comply with this Court's decision in Sims v. Georgia, 385 U.S. 538 (1967), that the record reflects with unmistakable clarity that the trial court found the confession to be voluntary. As to the second claim, whether the trial court erred in failing to instruct

the jury on the weight to be given a confession, the court concluded since no contemporaneous objection was made at trial and said issue did not constitute fundamental error, Smith was precluded from arguing said claim on direct appeal.

REASONS FOR DENYING THE WRIT

WHETHER THE FLORIDA SUPREME COURT ERRED IN AFFIRMING SMITH'S CONVICTION AND DEATH SENTENCE IN WHICH IT APPROVED THE ACTION OF THE TRIAL COURT WHEN SAID COURT ADVISED THE JURY THAT HE HAD FOUND SMITH'S CONFESSION TO BE VOLUNTARY.

In McDole v. State, 283 So.2d 553 (Fla. 1973), the Florida Supreme Court held that pursuant to the requirement set forth in Sims v. Georgia, 385 U.S. 538 (1967), a trial court must make a finding with unmistakable clarity for the record that the confession was voluntarily made prior to the admission of said confession. In Smith v. State, 407 So.2d 894 (Fla. 1981), the Florida Supreme Court was faced with the question of whether the trial court had erred in that he had made his findings of voluntariness known to the jury prior to the admission of said confession. Smith argues that the actions of the Florida Supreme Court:

> [R]eached the polar opposite conclusion from virtually every other appellate court which has had occasion to discuss the issue. Until now, it has consistently been held, assumed, or stated by way of dicta, that the trial court's finding of voluntariness should not be disclosed to the jury. See United States v. Bear Killer, 534 F.2d 1253, 1258-59 (8th Cir. 1976);. . ."

(Petitioner's petition, p.5). Respondent would disagree and submit that the authorities cited by Petitioner are either distinguishable or conclude that the activity complained of does not constitute reversible error.

Petitioner relies heavily on the Eighth Circuit's opinion in United States v. Bear Killer, 534 F.2d 1253 (8th Cir. 1976), wherein the Eighth Circuit found that although the trial court advised the jury therein of its finding of voluntariness, the error was harmless. A careful reading of the Bear Killer case, supra, reveals that said case specifically dealt with the statutory command of 18 U.S.C. 3501(a), to-wit: federal law. The decision of the Eighth Circuit in determining the correctness of the federal instruction was predicated on previous federal law in United States v. Adams, 484 F.2d 357 (7th Cir. 1973), as to whether a jury redetermines the constitutional admissibility of a confession. While at first blush, United States v. Bear Killer, supra, appears applicable, more careful analysis dispels any applicability to the instant case.

In dicta, the Eighth Circuit in Bear Killer, supra, observed that "irrespective of the statutory command, fairness requires that the court not disclose to the jury its finding of voluntariness." 534 F.2d at 1259.

The decision in United States v. Bear Killer, supra, is erroneous. Said decision fails to take into account the fact that where, as here, the trial court has made a finding of voluntariness, the jury is not required to redetermine whether said confession was voluntary, but rather the jury must determine the weight and truthfulness of said confession. See Lego v. Twomey, 404 U.S. 477, 486-489 (1972); Sims v. Georgia, supra; Jackson v. Denno, 378 U.S. 368 (1964); and Dempsey v. State, 355 A.2d 455, 460-461 (Md. 1976).

In the instant case Petitioner and the Eighth Circuit Court of Appeals in United States v. Bear Killer, supra, erroneously overlooked this Court's decision in Pinto v. Pierce, 389 U.S. 31 (1967), wherein this Court concluded

that where a voluntariness hearing was held in the presence of the jury, and said confession was held to be voluntary,

> This Court has never ruled that all voluntariness hearings must be held outside the presence of the jury, regardless of the circumstances. Jackson v Denno, [citation omitted], held that a defendant's constitutional rights are violated when his challenged confession is introduced without a determination by the trial judge of its voluntariness after an adequate hearing. A confession by the defendant found to be involuntary by the trial judge is not to be heard by the jury which determines his guilt or innocence. Hence, because a disputed confession may be found involuntary and inadmissible by the judge, it would seem prudent to hold voluntariness hearings outside the presence of the jury. In this case, however, the confession was held voluntary and admitted as evidence suitable for consideration by the jury. In addition, there is no claim that because the hearing was held in the presence of the jury it was inadequate or had any other unfair consequences for the respondent. . . .

389 U.S. at 32. In United States ex rel. Russo v. State of New Jersey, 438 F.2d 1343 (3rd Cir. 1971), the court in a capital murder case:

> . . . The mandate of *Jackson* is that the judge presiding at the trial must determine for himself that the confession is admissible. Once the judge has so determined, even if the hearing is held in the presence of the jury, as occurred here, the requirement of *Jackson* is satisfied. Pinto v. Pierce, *supra;* United States ex rel. Bennett v. Rundle, *supra*, 419 F.2d at 606; *see* Sigler v. Parker, 396 U.S. 482, 90 S.Ct. 667, 24 L.Ed.2d 672 (1970); Sims v. Georgia, 385 U.S. 538, 87 S.Ct. 639, 17 L.Ed.2d 593 (1967); the Supreme Court, 1963 Term, 78 Harv.L.Rev. 143, 211-213 (1964).

438 F.2d at 1348.

If it is permissible for the jury to hear the evidence presented at the voluntariness hearing and the trial court subsequently concludes that said confession was voluntary based on said hearing, how can there be any constitutional infirmity where, as in the instant case, the court with unmistakable clarity provides statements on the record that said confession was admissible, and therefore, subject to further jury consideration? Pinto v. Pierce, supra.

Petitioner attempts to suggest that the Florida Supreme Court has laid down an iron-clad rule that a trial judge can announce his findings to the jury with regard to the voluntariness hearing. Petitioner misreads Smith v. State, supra. The Florida Supreme Court observed that "[t]he judge in the case *sub judice* was doing just that: making, with unmistakable clarity, a finding for the record that appellant's confessions were voluntarily made. His comments, therefore, were not improper." 407 So.2d at 897. While the court found that said practice was not impermissible, the court did not extole the virtues of traveling this avenue in order that state trial judges complied with Sims v. Georgia, supra. To suggest that the Florida Supreme Court's decision is a carte blanche pronouncement is incorrect.

Petitioner's second complaint is that the trial court erred in not instructing the jury with regard to the weight to be given Smith's confessions. This issue was not preserved for appellate review, and the Florida Supreme Court so held in Smith v. State, supra, at 898. Pursuant to this Court's recent pronouncement in Engle v. Isaac, 31 Cr.L. 3001 (1982) and United States v. Frady, 31 Cr.L. 3013 (1982), and Wainwright v. Sykes, 433 U.S. 72 (1977), Petitioner is without redress as to this issue.

Finally, Petitioner asserts:

> Under the precedent set forth by the Florida Supreme Court in the present case, the trial court's announcement to the jury that he has found a confession voluntary will distort the jury's assessment of the reliability of the confession, and the weight to be accorded the confession.

(Petitioner's petition, p.12). Petitioner in arguing this issue to the state court did not assert this theory but rather that:

> A judge's determination on the admissibility of a confession does not finally determine its voluntariness. The credibility, weight, and value of the confession are still for the jury to determine, and the voluntariness of the confession is an important factor in that determination.

Petitioner was actually arguing to the state supreme court that the admissibility of the confession should have been redetermined by the jury. That is not the rule in Florida. Based on this Court's decision in Cardinale v. Louisiana, 394 U.S. 437 (1968), and Conquest v. Mitchell, 618 F.2d 1053 (4th Cir. 1980), Petitioner has failed to previously raise the claims raised herein.

Respondent would submit that based on the foregoing, this Court should deny Petitioner's Petition for Writ of Certiorari in the instant cause in that Petitioner has failed to demonstrate grounds upon which relief may be granted. The Florida Supreme Court in affirming the judgment and sentence below, did so in accord with decisions rendered by this Court.

CONCLUSION

WHEREFORE, the Petition for Writ of Certiorari should be DENIED.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished to STEVEN L. BOLOTIN, Assistant Public Defender, Second Judicial Circuit, Counsel for Petitioner, by hand this 23rd day of April, 1982.

_____
CAROLYN M. SNURKOWSKI
Assistant Attorney General

OF COUNSEL.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. _____

JIMMY LEE SMITH,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

A P P E N D I X

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IN THE SUPREME COURT
OF FLORIDA

JIMMY LEE SMITH,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 55,961

Docketed
5-14-79
Florida Attorney
General

RECEIVED
MAY 14 1979
ATTORNEY GENERALS OFFICE

ON APPEAL FROM THE CIRCUIT COURT OF
THE FOURTEENTH JUDICIAL CIRCUIT, IN AND
FOR JACKSON COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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IN THE SUPREME COURT
OF FLORIDA

JIMMY LEE SMITH,	:	
Appellant,	:	
v.	:	CASE NO. 55,961
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

INITIAL BRIEF OF APPELLANT

I PRELIMINARY STATEMENT

This is on appeal from two judgments of guilty of first degree murder and two sentences of death. The appellant was the defendant below and will be referred to as appellant or by name. The prosecuting authority will be referred to as the state.

The abbreviation "R" will be used for record, and references to the record will include appropriate page numbers. The numbers referred to are the consecutive series placed at the bottom of the page by the clerk. The supplemental record certified April 27, 1979 is not referred to.

II STATEMENT OF THE CASE AND FACTS

A Jackson County Grand Jury charged Jimmy Lee Smith on June 6, 1978 with the first degree murder of Bonnie Ward and Donna Strickland (R-1). The trial court granted Mr. Smith's motion, filed the same month, for a mental examination (R-10,12). He was examined by psychologists Dr. Elizabeth McMahon and Dr. Paul Satz who concluded he was competent to stand trial and legally sane at the time of the murders he was charged with (R-25). They, however, suspected an organic brain disorder and strongly recommended an electroencephalographic examination (R-27). At the end of Mr. Smith's trial his attorney filed with the court an "Acknowledgement" signed by Jimmy Lee which stated he had received the psychologists' report, discussed it, discussed the EEG recommendation with his attorney and concluded that he wanted to waive taking the EEG and proceed quickly to trial (R-28,651). Without inquiry the court accepted the "Acknowledgement" (R-651).

Jimmy Lee Smith moved to dismiss the indictment on the ground that the statutorily established sentencing procedure violated the strictures of Article V, Section 2(a) of the Forida Constitution (R-17,18). The court denied the motion (R-22). September 19 and September 20, 1978 Jimmy Lee Smith stood trial.

The judge excluded from the jury which tried Jimmy Lee Smith three people who said they would never recommend the death penalty (R-192,251,276).

Jimmy Lee Smith was convicted of killing Bonnie Ward and

her daughter Donna Strickland on May 1, 1978 (R-407). The night of April 30, 1979, Ms. Ward and Donna Strickland spoke poorly of Jimmy Lee's girlfriend, calling her a whore, and of his girlfriend's mother disparaging the way she raised her children. The next morning Jimmy Lee went with Ms. Ward to town to visit Donna's twin sister in the hospital and to run errands in Graceville (R-330,331,348,349,408,409,420,425,439,444).

Jimmy was angry about the times Bonnie Ward and Donna Strickland had spoken poorly of his girlfriend and her mother. (R-410, 411,424-426,442). Some time during the trip to Graceville and back Jimmy Lee thought of killing Ms. Ward and Donna (R-410, 417,446,447). At his request Bonnie Ward turned down a deserted road. There he says he killed Ms. Ward, and Donna when she came upon them, by strangling and stabbing them (R-407-412,415,429,430, 449,450,452). No medical or other evidence indicates the women were strangled. (R-411,426). The women's bodies had been stabbed repeatedly, Donn'a chest cut open, and Ms. Ward's throat sliced (R-463,464,466,467).

Jimmy said he cut Donna more severely because she had spoken more harshly of his girlfriend (R-414,452). Once he said he did not know why he cut her (R-455). When the bodies were found they were wrapped with blankets and laying in the bushes (R-376,377,382,431,432,453,456). Jimmy took the other two children home, fed them and put them to bed (R-432,457).

The next day he was picked up by an officer who saw him hitchhiking (R-369). He had with him Ms. Ward's watch and a knife (R-332,349,369,370,371).

Jimmy Lee gave five statements to police officers after acknowledging and waiving all of his rights (R-23,24,385-401). There is no evidence he knew the statements could be used to obtain a death sentence. Four of those statements were entered without objection into evidence during the guilt portion of the trial. Before the entry of each one, the judge said in the Jury's presence that he found the confessions voluntary.

The statements of Jimmy Lee Smith were the state's primary evidence. Other than the statements there was only the circumstantial evidence of the watch and knife in his possession and testimony of several people that he was the last person they saw the victims alive with (R-349,350). At the close of the state's case Mr. Smith moved for direct judgment of acquittal. The motion was denied (R-473).

The jury returned a verdict of guilty (R-31,32,537). The same jury after considering the evidence it had already heard, a videotape of an interview with Jimmy Lee and a psychologists' report, both of which were jointly entered recommended a sentence of death (R-33,34,714). The videotape (state's exhibits 10 and 11) is of a lengthy interview with Deputy Ron Steverson. In it Jimmy Lee Smith discusses his life, his thoughts and his reasons for killing Ms. Ward and Donna Strickland.

Jimmy Lee Smith was born December 19, 1953. He moved frequently in his early life. His father was in the Air Force. As a child Jimmy suffered from a number of diseases including bronchitis, asthma, and rheumatic fever. In 1968 he lost part of the vision in his left eye and was told to expect to lose

vision in both eyes while he was still young. Jimmy's father died when he was five or six years old. At the time the family was living in North Carolina near Jimmy's grandfather who often watched the children (R-545,550-552,556,557).

The grandfather hated Jimmy and beat him frequently. Jimmy thought his grandfather hated him because he suspected Jimmy had been sired by someone other than his father (R-552). Jimmy and his mother complained to his father but were not believed until his father found the grandfather in the act. The family moved away from the grandfather for a short while but moved back. Jimmy lived in this environment until his father's death (R-552-554).

Jimmy's father died in a car accident while rushing to the hospital to see Jimmy. Jimmy felt responsible for his father's death. For several years after his father's death Jimmy kept his picture in his room. He used to look at it, talk to it and frequently cry over it. His mother and brother threw the picture out (R-554-557).

After his father's death Jimmy's mother moved the family to Winter Haven, Florida. There Jimmy was stabbed in the chest by a neighborhood child who wanted to play on Jimmy's swing set. Although not caused by the knife wound, Jimmy began having serious heart trouble. He spent months in an oxygen tent. Several times he nearly died. Once in the hospital an angel whom Jimmy first mistook for Jesus came into the room. He said, "Jimmy you're going to be okay." Jimmy improved from that point on (R-554, 558-563).

In Winter Haven Jimmy's mother met and married a man. Soon afterwards the family moved to California. The new father beat the children and their mother. He beat them with his hands and with boards and frequently until they were bloody or the board was broken (R-563-568).

After about a year Jimmy's mother divorced this man. Later she returned to Florida with Terry Gilmore whom she eventually married. The family lived again in Winter Haven (R-568-570).

At this time, when Jimmy was about 14, he said he began stealing cars. Jimmy said he was caught stealing cars several times. Eventually he said his car thefts caused him to be sent to the Arthur Dozier School for Boys in Marianna (R-573,574,580).

Slight as he was Jimmy was often abused. He escaped several times from the school. Each time he was caught and beat severely. Frequently he was tracked with dogs. When he was caught the guards beat him and made him hug and kiss the dogs. For one car theft Jimmy said he was sentenced to four years in prison (R-574-587). In prison Jimmy was raped five times (R-588-591).

By the time he had finished serving his four years Jimmy's mother had moved to Texas. He followed. There he says he raped more than a dozen women in less than a year's time. He says he killed one of those women (R-548,549,592-608,627-636). The state presented no independent proof of any of these claimed crimes.

Later Jimmy felt driven to return to Florida which he did. There he killed Bonnie Ward and Donna Strickland. He said he killed them primarily because of the bad things they had said

about his girlfriend and her mother. But that killing and his other violent crimes were caused also by an uncontrollable compulsion to hurt. He could feel the desire coming on and would fight it usually unsuccessfully. Although he fought it, it grew stronger and stronger until finally it took control. The feeling was accompanied with a strange smell and a strange taste. He could not control himself (R-596,601,609-627,640-648). Afterwards Jimmy knew he had done wrong. He cried and begged God and his victims for forgiveness. But at the time of violence he did not know he was doing wrong and could not control himself (R-596,608).

He thinks he is insane and wishes he had had help. In jail Jimmy almost hung himself (R-637-648).

The psychologists learned Jimmy matured much later than his peers and was the brunt of their teasing (R-26). Under stress they found "his emotional and behavioral controls break down . . . ." (R-26). Those are the times he experiences strange odors and tastes. The psychologists said the sensations suggest a seizure which may account for some of the bizarre details of his behavior (R-26). They concluded "in view of Jimmy's report of olfactory and gustatory sensations at the time of these incidents, we would strongly recommend that he receive an electro-encephalographic examination . . . . "(R-27). The results they felt could be relevant to mitigating circumstances (R-27).

After a brief inquiry into Jimmy's knowledge of his right to counsel and the possibility of a death penalty, the judge allowed Jimmy to ask the jury for death. Afterwards the jury

advised imposing the death penalty. The judge sentenced Jimmy to death on both counts. He found two aggravating circumstances. He held Jimmy had killed Donna Strickland to prevent her from testifying against him about the murder of Bonnie Ward and that therefore the killing was committed to distupt or hinder the lawful exercise of any governmental function (R-87). The judge also held Bonnie's murder was especially heinous, atrocious and cruel because he killed her although she asked him to leave her alone and because he looked into her eyes while he strangled her (R-87,88). Donna's killing too the judge found heinous, atrocious and cruel.

The judge found no mitigating circumstances. He specifically found, relying upon Jimmy's statements about previous crimes, that Jimmy had a significant history of prior criminal activity (R-88). He also specifically found there was not evidence that the murders were committed while the defendant was under the influence of extreme mental or emotional disturbance. And he specifically found there was no substantial impairment of Jimmy's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law (R-88). The judge concluded by stating that killing Donna Strickland and ripping open her body to look at her heart alone was sufficient aggravating circumstances to justify the imposition of the death penalty (apparently for both murders) (R-89).

Jimmy Lee Smith filed a timely notice of appeal from both judgments and sentences (R-93). He was adjudicated insolvent, and the Public Defender for the Fourteenth Judicial Circuit

was appointed to represent him (R-95). The Office of the Public Defender for the Second Judicial Circuit was designated to handle the appeal.

III ARGUMENT

ISSUE I

JIMMY LEE SMITH WAS DENIED DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS WITHIN THE MEANING OF THE FIFTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9, FLORIDA CONSTITUTION WHEN THE TRIAL COURT FAILED TO PROPERLY INSTRUCT THE JURY UPON THE WEIGHT TO BE GIVEN A CONFESSION BUT RATHER COMMENTED UPON THE WEIGHT OF THE CONFESSION AS EVIDENCE DURING THE COURSE OF THE TRIAL.

A. FAILURE TO INSTRUCT

Section 918.10(1), Florida Statutes (1977) requires:

> At the conclusion of argument of counsel, the court shall charge the jury. The charge shall be only on the law of the case and must include the penalty of the offense for which the accused is being charged.

And Florida Rule of Criminal Procedure 3.390(a) requires:

> The presiding judge shall charge the jury only upon the law of the case at the conclusion of argument of counsel, and must include in said charge the penalty fixed by law for the offense for which the accused is then on trial.

Mr. David U. Tumin, in his comment on the rule, states:

> For some unknown reason, the Legislature did not repeal the statute as being superseded by the Rules of Criminal Procedure, and as of the time of this writing, the statute remains in effect. 34 F.S.A. 93 (1975).

Perhaps the "unknown reason" is because the Legislature is of the opinion that whether to instruct a jury in a criminal prosecution on the law they are to apply to the evidence they receive is a substantive matter and not merely procedural. Judge McCrary did not instruct Jimmy's jury on his confessions. See Fla.R.Crim.P. 3.390(b). One would expect to find such an instruction after the instruction on the "defendant not testifying" (R 529), if the trial court were using the instructions suggested

by this court. Fla.Std.Jury Instr. (Crim.) 2.13(i). Although there was no objection to the failure of the judge to instruct on the law of appellant's case, there is no record of an opportunity given to object to the charge out of the presence of the jury (R-536).

The failure to properly instruct the jury regarding appellant's confession was fundamental error as to both stages of the bifurcated trial. The landmark case of Harrison v. State, 149 Fla. 365, 5 So.2d 703 (Fla. 1942) speaks to the issue in the following language:

> "Section 4363, C.G.L., makes it the statutory duty of the several trial courts of Florida in all cases at law and in all criminal prosecutions to charge the jury 'upon the law of the case'. Section 215 of the Criminal Code, supra, makes it the statutory duty of a trial court to charge the jury 'upon law of the case.' 'The law of the case' contemplated by Section 215 of the Criminal Code and Section 4363, C.G.L., includes the weight to be given by juries to confessions as enunciated by the several decisions and utterances of this Court. The conviction of the appellant here necessarily rests on the confession. The admitted charge, under the circumstances of the case at bar was of tremendous interest to the appellant and is one safeguarded to him by the laws of Florida. It was the duty of the trial court under the circumstances of this case to so charge the jury, whether requested so to do by counsel or not. The omitted charge, as shown by the record in this case, was a part of 'the law of the case' provided for in Section 4363, C.G.L., and Section 215 of the Criminal Code.
>
> For the errors committed the judgement appealed from is hereby reversed and a new trail awarded.

Harrison v. State, 5 So.2d at 707.

The Harrison court never found the confession to be inadmissible. The point is that when a confession is admitted into evidence the jury must be instructed on how to consider it.

The error of omission in failing to advise the jury on the weight to be given a confession is considered so serious that this court has used it as an example when it has sought to define fundamental error. E.g., Brown v. State, 124 So.2d 481 (Fla. 1960) at 484. The district courts of appeal in Florida have applied the doctrine in various decisions. Recently, in overturning a burglary conviction, a Florida appellate court stated:

> "Florida Rule Criminal Procedure 3.390(a) requires that the presiding judge shall charge the jury only upon the law of the case, i.e., a charge must be given which covers substantially the elements which the jury should evaluate in considering the credibility to be accorded to the statement. See Leach v. State, 132 So.2d 329 (Fla. 1961). Although we feel that the better practice would have been for appellant to have made a request for a specific instruction at the time of the charge conference, the failure of the trial court, pursuant to appellant's request for such an instruction prior to the time the jury retired, to give either the Florida Standard Jury Instruction (Criminal) 2.13(i) or another appropriate instruction constituted reversible error. See, e.g., Harrison v. State, 149 Fla. 365, 5 So.2d 703 (1942); Taylor v. State, 320 So.2d 428 (Fla. 2nd Dca 1975); and Fla.R.Crim.P. 3.390(a).
>
> In the light of this determination, calling for reversal of the judgment and sentence appeal, [sic] it is unneccessary for us to consider the other points raised by appellant on appeal.
>
> Reversed and remanded."

Bunn v. State, 363 So.2d 16 (Fla. 3d DCA 1978) at 17.

Appellant is also entitled to a new trial.

B. COMMENT ON EVIDENCE

The trial court committed an additional error which compounded its failure to instruct on the weight to be given defendant's statements as set forth above. The court commented on the weight, of the confession evidence during the course of

the trial.

The state announced that it planned to introduce some statements given by appellant (R-391). The court excused the jury and heard evidence regarding the admissibility of the statements (R-392). Outside the presence of the jury the court ruled that Jimmy's statements were voluntarily given and admissible (R-394, 395,396,397,400,401).

The jury then returned to the courtroom (R-401). The state proceeded to introduce the statements into evidence. The court, in successive statements in the presence of the jury, stated:

> The Court has ruled that the statement has been freely and voluntarily given by the defendant, Jimmy Lee Smith, and admitted into evidence. It will be for your consideration at this time. You may proceed. (R-406).
>
> * * *
>
> The Court will rule that this statement was freely and voluntarily given. It will be admitted into evidence at this time (R-419)
>
> * * *
>
> The Court will rule that the statement was freely and voluntarily given and will now be admitted into evidence (R-436).

A judge's determination on the admissibility of a confession does not finally determine its voluntariness. The credibility, weight, and value of the confession are still for the jury to determine, and the voluntariness of the confession is an important factor in that determination. See Pearce v. State, 143 Fla. 347, 196 So. 685 (1940). Judge McCrary's comments were plainly comments upon the evidence. See, Walker v. State, 488 S.W.2d 40 (Ark. 1972), (judge's statement that he had passed on a confession's voluntariness was comment on evidence re-

quiring reversal); State v. Carter, 268 N.C. 648, 151 S.E.2d 602 (1966).

> The firmly established rule in Florida is that the trial judge should avoid making directly to or within the hearing of the jury any remark which is capable directly or indirectly, expressly, inferentially or by innuendo of conveying any intimation as to what view he (or she) takes of the case or as to what opinion the judge holds as to the weight, character or credibility of any evidence adduced.

Parise v. State, 320 So.2d 444,445 (Fla. 3d DCA 1975).

Judge McCrary's comment upon Jimmy's confessions was error and particularly harmful since the confessions were the bulk of the state's evidence. Had they been objected to the comments would be reversible error. Parise v. State, supra; Walker v. State, supra; State v. Carter, supra.

Despite Jimmy's attorney's failure to object this court should reverse his conviction because of the judge's comment upon the evidence as well as his failure to instruct the jury upon the weight to be given a confession. In death cases, this court has a "special scope of review" which it has exercised to reach error not objected to. Elledge v. State, 346 So.2d 998 (Fla. 1977). The need for its exercise here is prominent. Jimmy's conviction could not stand without the confessions. "Human life is too precious to have an individual executed without being afforded all of the safeguards provided by the Constitutions, statutes and rules of court." Dobbert v. State, 328 So.2d 433,443 (Fla. 1976), Boyd, J., dissenting.

ISSUE II

THE TRIAL COURT ERRED IN FAILING TO INSURE THAT A COMPLETE RECORD WAS MADE OF THE TRIAL PROCEEDINGS, AND REVERSAL OF THE CONVICTIONS IS REQUIRED BECAUSE A FULL RECORD IS NOT OBTAINABLE FOR REVIEW.

The transcript of the trial proceedings is incomplete. The court's reporter did not stenographically report the closing argument of appellant's counsel during the trial itself (T-410). The court reporter has expressed in the transcript that the closing argument during the trial of appellant's guilt or innocence was not recorded or preserved (T-410). Appellant stood silent during the trial and offered no evidence, in accordance with his right under the Fifth Amendment to the United States Constitution and Article I, Section 9, of the Florida Constitution. However, the one portion of these proceedings when appellant's counsel stood up to speak for him was during argument to the jury. This was when appellant's theory of defense was put forward. It was during this portion of the proceedings that appellant spoke through his counsel, as is his right under the Sixth Amendment and Article I, Section 16, Florida Constitution.

The ommission of the portion of the proceedings where appellant presented his case from the record this court can review is a denial of his right to full review of the entire record of the proceedings which resulted in the sentence of death being imposed upon him.

The ommission of the closing argument from being recorded makes it impossible for him to present his side of the case for

a review on appeal. This court has provided in Florida Rules of Judicial Administration, 360 So.2d 1076 (Fla. 1978), in Rule 2.070(a) and (b) that all portions of criminal proceedings be reported and available for transcription:

RULE 2.070. COURT REPORTING

> (a) When Reporting Required. All criminal and juvenile proceedings, and any other judicial proceedings required by law or court rule to be reported at public expense, shall be reported. Any proceeding shall be reported on the request of any party. The party so requesting shall pay the reporting fees but this requirement shall not preclude the taxation of costs as authorized by law. Grand jury proceedings, upon order of the chief judge of the circuit, shall be reported; however, no transcription may be made without an order of a court of competent jurisdiction requiring said transcription.
>
> (b) Record. When trial proceedings are being reported, no part of the proceedings shall be ommitted unless all of the parties agree to do so and the court approves the agreement.

These rules of administration when into effect July 1, 1978. Rule of Judicial Administration 2.010. Although this court on July 21, 1978 issued an amended order delaying the effective date of Rule 2.070(f) until January 1, 1979, to allow a reasonable transition period for court reporters to comply with the rule, the effective date of Rule 2.070(a) and (b) was not delayed. The only portion of the rule which did not go into effect on July 1, 1978 was the portion dealing with the uniform size, lettering, lines per page, and the like for transcripts. The requirement that all criminal proceedings be reported in their entirety unless all of the parties agree, and the trial court approves the agreement, was a rule applicable during the trial of this cause in September of 1978.

No agreement of the parties, and no approval by the trial court, appears on the record of this case for the ommission by the court reporter to have reported a closing argument of appellant by his counsel during the trial of his guilt or innocence.

A transcript in a death penalty case where the defendant's only statements in his defense are ommitted is insufficient for a review under Section 921.141(4), Florida Statutes (1977), which provides that a judgment of conviction and sentence of death are subject to automatic review "of the entire record".

In prior decisions under said statute this court has held as a matter of law that a full record of the trial proceedings in death penalty cases be before it in order for the appellant to have full review. In Delap v. State, 350 So.2d 462 (Fla. 1977), this court acknowledged its "mandatory constitutional duty" to afford the appellant in death penalty cases his "right to a complete review", and the court reversed the conviction and sentence of death and remanded for a new trial where the entire trial transcript was not available.

In Zeigler v. State, Fla.S.Ct. Case No. 50,355 - Order entered November 23, 1977), this court stated:

> Under our death penalty statute which has been upheld by the United States Supreme Court, we must mandatorily review this case in its entirety.

(Page 2 of Order).

In Tibbs v. State, 337 So.2d 788, 791 (Fla. 1976), in reversing a conviction for a new trial due to the unsatisfactory nature of the evidence, this court noted, that where "a man's life has been placed in jeopardy", the "Florida Legislature has directed that we review the 'entire record'".

What the absence of appellant's counsel's argument to the jury during the trial or guilt or innocence means is that this court can review only the prosecution's side of the case. It is not possible for this court to review the defendant's side of the case because the portion of the proceedings where his case was presented is ommitted from the record available for this court to review.

Although closing arguments of counsel might be waived in other cases, in death penalty cases Section 921.141(4), Florida Statutes, requires that the entire proceedings be reviewed. The waiver required by Rule of Judicial Administration 2.070(b), for any portion of the proceedings to be ommitted from the transcript of record was not followed in this case. No waiver appears in the record, and no approval by the trial court appears in the record as required by the above rule.

In cases where an adequate record for review on direct appeal of a criminal conviction was not obtainable, reversals for new trials have been ordered. In Simmons v. State, 200 So.2d 619, 620-621 (Fla. 1st DCA 1967), the court stated:

> The right of one convicted of a crime to an appellate review of such judgment of conviction as may be rendered against him is a necessary ingredient of due process of law as guaranteed by the constitution of this state. [footnote omitted]

Likewise, in Bannerman v. State, 283 So.2d 124 (Fla. 1st DCA 1973), where the notes of the proceedings had been lost or destroyed, and a reconstruction of the record was not possible, appellate review was impossible and a new trial was ordered. See also, Roper v. State, 341 So.2d 523 (Fla. 3d DCA 1976); Dismukes v. State, 299 So.2d 133 (Fla. 3d DCA 1974); Holsinger v.

State, 314 So.2d 822 (Fla. 4th DCA 1975); Yancey v. State, 267 So.2d 836 (Fla. 4th DCA 1972); and Fernandez v. State, 292 So.2d 410 (Fla. 3d DCA 1974).

The closing argument for an accused on trial for his life, especially in a case where that was the only portion of the proceeding where the accused spoke, or had someone speak for him, is no trivial ommission. This is the place at which appellant would have raised his defenses either to guilt or to the degree of guilt for which the indictment charged.

Moreover, it is essential that this court have the closing arguments of defense counsel for appellant because if appellant was ineffectively represented by counsel at the only occasion at which counsel acted affirmatively for his client, such facts should not be shown otherwise than by a transcript. The due process and equal protection clauses of the Fourteenth Amendment require that an indigent criminal defendant be provided with an adequate transcript for full appellate review. Mayer v. Chicago, 404 U.S. 189 (1971). A full transcript is required in Florida for review of the sufficiency of the evidence. Nelson v. State, 85 So.2d 832 (Fla. 1956). When the right to call witnesses under oath was extended to felony cases in England in 1701, the accused retained his right "to make what statements he liked" either through counsel or in person. See Faretta v. California, 422 U.S. 806, 824-825 n. 21-23 (1975). Appellant's decision not to testify did not deprive him of his right to make his defense through counsel in argument to the jury. Therefore, the transcript of the portion of the proceedings where this

defense was made must be a part of the record for this court to review to insure that no prejudicial error occurred during the trial. For example, limitations on a defendant's argument can be "such a deprivation as to require a reversal of the judgment." May v. State, 89 Florida 78, 82, 103 So. 115 (1925), where this court held that a limitation of counsel to twenty minutes of argument even in a case which was not complicated required reversal for a retrial. Should such an error have occurred here, this court would be unable to rectify it. The "full measure of the right to be heard, accorded by the Constitution" is denied to appellant here because he is deprived of the opportunity to have his part of the case heard in this court upon a record of the proceedings. May v. State, 89 Fla. at 81. See also, Cooper v. State, 106 Fla. 254, 143 So. 217 (1932).

Wherefore, appellant prays the court will vacate the judgments and sentences and remand with instructions that appellant be afforded a new trial.

ISSUE III

IS SECTION 921.141, FLORIDA STATUTES UNCONSTITUTIONAL UNDER ARTICLE V, SECTION 2 (a) OF THE FLORIDA CONSTITUTION BECAUSE THE STATUTE IS PROCEDURAL AND HAS NOT BEEN PROMULGATED OR ADOPTED AS A RULE OF PROCEDURE BY THE SUPREME COURT OF FLORIDA?

Jimmy Lee Smith was adjudicated guilty and sentenced to death on October 4, 1978 (R-82). Death penalty proceedings were conducted as provided in Section 921.141, Florida Statutes, (1977). Before the sentencing hearing Jimmy Lee Smith had moved to dismiss his indictment on the ground that Section 921.141 was an unconstitutional promulgation of a rule of procedure by the legislature (R-17). His motion was denied (R-22). This argument is inspired by Florida State University Law Professor John Yetter's article in the May, 1978, Bar Journal, The Florida Death Penalty - Is It Unconstitutional Under State Law . . .? 52 Fla.B.J. 372. The issue is also before this court in Vaught v. State, Case No. 52,835 and Morgan v. State, Case No. 54,939.

Article V, Section 2(a) of the Florida Constitution provides that "The supreme court shall adopt rules for the practice and procedure in all courts . . . ." Construing that provision, The Florida Supreme Court has held that the Legislature may not enact any law "relating to practice and procedure;" In Re Clarification of Florida Rules of Practice and Procedure (Florida Constitution, Article V, Section 2(a), 281 So.2d 204 (1973). Any such law is void unless adopted by the court. State v. Smith, 260 So.2d 489 (Fla. 1972). The determinative issues here are whether section 921.141 is procedural and whether it has been adopted or promulgated by the Florida Supreme Court.

The legislative history of Section 921.141 is relevant to both points. Until 1972, capital conviction meant the death sentence unless a majority of the jury recommended mercy. If the jury recommended mercy, a life sentence was mandatory. §921.141, Fla.Stat. (1971). Since then there have been three material changes in Section 921.141. Chapter 72-72, Section 1, Laws of Florida, with an effective date of October 1, 1972, bifurcated the trial. It retained the finality of the jury's decision, but gave it a list of aggravating and mitigating factors to consider. The amendment also added permission for trial courts to empanel a new sentencing jury where the trail jury was unable to recommend a sentence due to inability to one or more of its members to function. See also, Lee v. State, 294 So.2d 305 (Fla. 1974). Donaldson v. Sack, 265 So.2d 499 (Fla. 1972) declared the 1971 death penalty statute unconstitutional. It expressly refused to consider Chapter 72-72. The law was amended again December 8, 1972. Chapter 72-724, Section 9, Laws of Florida removed one mitigating factor, the defendant's belief that the killing was morally justified, from the statute and made the jury's recommendation advisory only, shifting the final sentencing burden to the trial court. The amendment also deleted the provision providing for new sentencing juries. Chapter 74-379, Section 1, Laws of Florida, effective October 1, 1974, reinstated the provision for empaneling of a second jury. Subsequent changes have been editorial only. See, Chapter 77-104, Section 248, and Chapter 77-174, Section 1, Laws of Florida.

A. Section 921.141 Attempts to Govern Practice and Procedure in the Courts.

The Florida Supreme Court said in Lee v. State, supra, and the United States Supreme Court said in Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977) that section 921.141 is procedural. Both decisions subjected defendants to the death penalty although the capital punishment statute in effect at the time of their crimes had been declared unconstitutional in Donaldson v. Sack, supra. The courts justified their holdings solely on the basis that retroactive application of the new sentencing proceedings did not violate the constitutional prohibition against ex post facto laws because the statutes were procedural only. The Florida Supreme Court's opinions in State v. Dixon, 283 So.2d 1 (Fla. 1973) and Lee v. State, supra further emphasized the procedural nature of the statute. In Dixon the court exercised its rule-making power to require findings of fact by trial judges who impose the life sentence on the people convicted of first degree murder. In Lee noting the absence in Chapter 72-724 of a provision for impaneling a second jury if needed, the court said:

> There are no other circumstances enumerated under this statute for the impaneling of a second jury to hear the issue of penalty. Since the question raised is one of procedure to be used for the imposition of sentence, it is properly within the constitutional authority for a determination by this Court, and there is precedent for impaneling of a second jury solely for the imposition of penalty in the capital case absent statutory authority. See: Barlow v. Taylor, 249 So.2d 437 (Fla. 1971).

Lee v. State, 294 So.2d at 308. (footnote omitted)

By exercising its procedural power in those cases the court demonstrated the procedural nature of the sentencing statute.

If these opinions had not so clearly established Section 921.141 as a law governing procedure, there would still be little doubt about its procedural nature. Substantive law describes actions which are criminal and prescribes the punishment. "Practice and procedure pertains to legal machinery by which substantive law is made effective." In Re Florida Rules of Criminal Procedure, 272 So.2d 65, 65 (1973), Adkins, J. concurring. See also Benyard v. Wainwright, 322 So.2d 473 (Fla. 1975); State v. Garcia, 229 So.2d 236 (Fla. 1969). A statute which establishes factors to be considered in mitigation, the type of evidence to be considered, and the time and manner for determining a sentence falls neatly into the definition of procedure.

B. The Florida Supreme Court has not adopted Section 921.141 as a rule of procedure.

None of the various permutations of Section 921.141 have been expressly adopted as rules of procedure by this court. Arguably the present statute's predecessor, Chapter 72-72, was adopted by In Re Florida Rules of Criminal Procedure, 272 So.2d 65 (Fla. 1973). The brief order of the court stated statutes in effect and not superseded shall remain in effect. The sentencing procedure in Chapter 72-72 differs significantly from the present law. It establishes a mitigating circumstance, the defendant's belief in a moral justification for his acts, which the present statute does not include. More importantly it makes the jury's life recommendation binding whereas the present statute does not. If Chapter 72-72 was adopted its

adoption does not change the error in sentencing Jimmy Lee Smith under the different law which began life as Chapter 72-734 on December 8, 1972, two days after the opinion adopting the Rules of Criminal Procedure was issued. Since December 6, 1972, this court has not expressly adopted or used any language which could be reasonably construed as adopting section 921.141 since then.

This court could rule, however, that it impliedly adopted the statute in The Florida Bar; In Re Florida Rules of Criminal Procedure, 343 So.2d 1247 (Fla. 1977). That opinion promulgated Florida Rule of Criminal Procedure 3.780 which provides for cross-examination of witnesses, introduction of rebuttal evidence, and the sequence for an attorney's arguments in death penalty sentencing proceedings. It specifically referred to proceedings under Section 921.141, Florida Statutes (1975) which is identical in all relevant aspects to the present statute.

Dicta in State v. Smith, indicates such a reference "breathes life into a legislative Act which purports to permit appellate review of a pretrial order". State v. Smith, 260 So.2d at 490 (footnote omitted). The opinion does not explain that conclusion, and it does not rely upon it for its holding. The holding was that a different statute was an unconstitutional infringement on this court's constitutionally protected rule making authority. Cf. Carter v. Sparkman, 335 So.2d 802 (Fla. 1976), (Stating specifically that legislatively enacted procedural requirements were adopted by the court).

This court could also dispose with the entire issue by

reflexively adopting the present statute retroactively. Both these alternatives while simple and politically expedient deny the citizens of the state the very benefit Article V, Section 2(a) of the Florida Constitution sought to preserve, carefully considered procedural rules by the body most qualified to determine the efficacy and fundamental fairness of a judicial proceedings. Judical expertise in sentencing procedures has been noted in particular. "[T]he informed exercise of judicial discretion and sentencing as a procedural matter properly determined by court rule. [It is] predicated upon an understanding that trial judges have a superior vantage point relative to the circumstances of an offense and have information of an offender's prior criminal record readily available to them." Huntley v. State, 339 So.2d 194, 196 (Fla. 1976). See also, State v. Dixon, 283 So.2d 1 (Fla. 1973); Proffitt v. Florida, 428 U.S. at 252, 49 L.Ed.2d at 92

Nothing in the order adopting Rule 3.780 indicates any consideration of the statutory death penalty procedure. Traditionally this court promulgates rules only after careful deliberate consideration of the rights and remedies being implemented and the workings of the judicial system. This deliberative process usually includes solicitation of views from interested parties, submission for public comment of proposed rules, and judicial hearings. The careful, informed reasoning of this process could never be more important than when the end result establishes the procedural path to death.

> The court should . . . establish a committee to study the problem of what procedures most completely eliminate arbitrariness and guarantee consistency in the imposition of capital punishment. The investigations

> of the committee and the deliberations of the court would be reasonably free from distorting political pressures, both because they [sic] arena and because the question would be a narrow procedural one rather than one reimplicating the merits of the death penalty itself. A rule promulgated by the court after such a process would undoubtedly improve upon Section 921.141 in assuring that the death penalty is imposed in a uniform manner based only upon the cupability of the offenders.

Yetter, supra, at 375.

The statute establishing the procedure under which Jimmy Lee Smith was sentenced to death is invalid because it is beyond the authority of the legislature to implement rules of procedure. This court should declare unconstitutional so much of Section 921.141 as is procedural (all but the aggravating circumstances) under Article V, Section 2(a) of the Florida Constitution. Jimmy Lee Smith's death sentence should be vacated and his case remanded for a sentencing hearing under proceedings adopted by this Court whether they be those found in Chapter 72-72 or new ones promulgated and made retroactively effective.

ISSUE IV

SHOULD JIMMY LEE SMITH BE GIVEN A NEW TRIAL IN THE INTEREST OF JUSTICE?

"In capital cases, the court shall review the evidence to determine if the interest of justice requires a new trial . . . ." Fla.R.App.Pro. 9.140(f). In the recent past this court has exercised its power to grant a new trial in the interest of justice. Tibbs v. State, 337 So.2d 788 (Fla. 1976). It should do so now.

The psychologists' report, upon which any decision on whether to raise the insanity defense had to rely, is internally inconsistent. It states Jimmy Lee Smith may have an organic brain disorder which could cause a sub-cortical limbic system type seizure. The report strongly recommended further testing using deep nasopharyngeal leads and said the disorder could be relevant to mitigating circumstances by explaining Jimmy's bizarre behavior. His insanity at the time of the offense, however, the report said would not be affected. The report is internally inconsistent.

In some cases epilepsy may explain violent crimes. Gunn and Fenton, Epilepsy, Automatism, and Crime, The Lancet, Vol. I, p. 1173 (1971). Nasopharyngeal leads are one form of special electrodes used to detect electroencephalographic manifestations of seizures which may be undetected by scalp leads or clinical observation. They are particularly useful in determining the time an attack begins and its duration. Klass, Electroencephalographic Manifestations of Complex Partial

Seizures, Advances in Neurology, Vol. 11, Ch.6 (1979); Lieb, Walsh, Babb, Walter, and Crandall, A Comparison of EEG Seizure Patterns Recorded with Surface and Depth Electrodes in Patients with Temporal Lobe Epilepsy, Epilepsia, Vol. 17, pp 137 - 160 (1976). The recommended testing could have determined if, when, and how a seizure in Jimmy was triggered. If it revealed the possibility of a seizure beginning any time before Jimmy killed Donna then the information would have been relevant to his sanity at the time of at least one of the offenses.

The possibility of an organic brain disorder explaining even one of these killings goes straight to the central precept of our criminal justice system -- an individual is criminally liable only for those acts for which he is personally responsible. Actual absence of control over actions, be it due to insanity, duress, or emergency, has consequently always been a valid defense. The inconsistency between the psychologists' conclusion and the data it is based upon raises the real possibility a man has been sentenced to die for acts he could not control.

Justice encompasses more than defendants' rights. It includes a fundamental interest in decisions based upon truth. The evidence before this court shows one very important truth went unexplored, perhaps because of erroneous information supplied by court appointed psychologists. When life is at stake, the interests of justice require exploring the possibility in further testing and a new trial in which decisions are based upon facts not opinions inconsistent with the stated facts.

The appellant's attorneys represent that Jimmy Lee Smith wishes to submit to further testing and that Doctors Elizabeth

McMahon and James Willmore of Gainesville, Florida are willing to conduct the needed tests. Appellant's attorneys also represent that Dr. McMahon has stated she intends to file with the trial court a supplement to her original report and that it will state the report's conclusion that the organic disorder would not render Jimmy legally insane was wrong.

ISSUE V

WAS JIMMY LEE SMITH DENIED A JURY OF HIS PEERS WHEN JURORS WERE EXCUSED FOR CAUSE BECAUSE THEY DID NOT BELIEVE IN DEATH AS PUNISHMENT.

Three prospective jurors were excused for cause because they answered on their voir dire examination that they did not believe in putting a man to death (T-191,192,148,149,173,174). None of them expressed an inability to set aside their personal views; none said they would refuse to follow their duty and oath; none indicated they would forswear the juror's oath; and none said they would be unable to find facts in such a way that the death penalty might result. Mostly they just said, yes sir (R-191,192,148, 149,173,174).

Accordingly, the guiding principle of the Sixth Amendment was not followed in the selection of the jury which found appellant guilty and recommended his death, that is: That an accused is entitled to have his jury chosen from a random cross-section of the community from which no persons are systematically excused for their personal views except upon inability to follow and apply the law. Taylor v. Louisianna, 419 U.S. 522 (1975).

The exclusion of the three jurors in the present case does not comport with Witherspoon v. Illinois, 391 U.S. 510 (1968), because none of these jurors stated that he or she was "irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings". Id., at 522 n.21.

The improper exclusion of a single juror mandates that the

death penalty be vacated in this cause. Davis v. Georgia, 429 U.S. 122 (1976). "Conscientious scruples about imposing the death penalty" or just not "believing in it" are not grounds allowing excuses of prospective jurors for cause. Maxwell v. Bishop, 398 U.S. 2621 (1970); Boulden v. Holman, 394 U.S. 478 (1969).

The superficial inquiry in the present case, the propounding of leading questions, and the conflicting answers given by Mr. Robinson (T-148-9) were not adequate to show disqualification for cause from jury service. Burns v. Estelle, 592 F.2d 1297 (5th Cir. 1979).

Wherefore, it is prayed a new trial be granted and that, alternatively, a new sentencing proceeding be conducted.

ISSUE VI

MAY A JUDGE ALLOW A DEFENDANT IN A CAPITAL CASE TO WAIVE HIS RIGHT TO COUNSEL AND TO ASK THE JURY FOR THE DEATH PENALTY WITHOUT FIRST INQUIRING INTO THE DEFENDANT'S KNOWLEDGE OF THE ELEMENTS OF A CAPITAL CRIME AND HIS POSSIBLE DEFENSES?

Jimmy Lee Smith asked the jury to recommend his execution. The court allowed this after a limited inquiry into Jimmy Lee's knowledge of his right to an attorney and the consequences of his action. Judge McCrary did not inquire into his knowledge of the aggravating circumstances, at least one of which the state must prove beyond a reasonable doubt before the death penalty may be imposed. The court did not ask Jimmy if he knew the law provided for consideration of mitigating circumstances, nor did he inquire if Jimmy knew what any of the mitigating circumstances were which could offset an aggravating circumstance. The court did not determine if Jimmy knew that the jury's recommendation might not be final.

Without inquiring as to Jimmy Lee's knowledge of these crucial elements of a death penalty proceeding, the court allowed Jimmy to waive his right to counsel, waive his right to seek a life sentence, waive his right to present evidence in his own behalf, and waive his right to challenge the state's evidence and arguments. By allowing such a total waiver of all substantive protections without inquiring into Jimmy Lee's knowledge of the essential elements of a capital offense and the defenses to it the court denied him the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 12, of the Florida

Constitution's Declaration of Rights.

This court has not yet addressed the issue of what standards should be met before a trial judge may allow a defendant to waive his rights in a sentencing proceeding and plead for death. It has, however, recognized the significance of waiving sentencing proceeding rights. It has reversed a death penalty for a sentencing hearing solely because the record did not show the defendant had been informed of his right to a sentencing proceeding. Lamadline v. State, 303 So.2d 17 (Fla. 1974).

In the present case the Court must determine what is a sufficient inquiry. The issue recurs, Salvatore v. State, 366 So.2d 745 (Fla. 1979); Goode v. State, 365 So.2d 381 (Fla. 1979); State v. Carr, 336 So.2d 358 (Fla. 1976); Lamadline, supra. Defendants, judges, and lawyers alike all need for this court to articulate a definite standard for waiver which insures the "greater degree of reliability", Lockett v. Ohio, 438 U.S. ___, 57 L.Ed.2d 973, 989 (1978) essential to death penalty proceedings.

The standards required by the constitution to determine if a guilty plea is knowing and voluntary are appropriate standards to apply to this critical decision. The practical effects of the two decisions are the same.

> A defendant who enters such a plea, simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464, 82 L.Ed. 1461, 1466, 58 S.Ct. 1019, 146 A.L.R. 357 (1938). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of

> due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.

McCarthy v. United States, 394 U.S. 459, 466, 89 S.Ct. 1166, 1171, 22 L.Ed.2d 418, 425 (1969) (footnotes omitted).

The same kind of full inquiry should have been utilized before Jimmy Lee Smith was allowed by the judge to waive his every meaningful right at the penalty portion of the trail. For example, he waived his privilege to remain silent, his right to confront and cross-examine all witnesses and evidence, his right to make argument and to present evidence in his own behalf. He essentially admitted all the elements of a formal criminal charge, those standards which define who may be punished by death. That decision could not truly be voluntary unless he was informed of what the standards were.

North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed. 2d 162 (1970) illustrates the functional equivalence to a guilty plea of Jimmy Lee's decision to address the jury and request the death penalty. Alford, who was charged with first degree murder, entered a guilty plea to a charge of second degree murder although maintaining his innocence. In the discussion rejecting Alford's claim that a guilty plea cannot be accepted from someone who claims innocence, the court compared nolo contendere pleas to guilty pleas. Unlike a guilty plea, a nolo contendere plea is not an admission of guilt. It is, however, a waiver of the right to trial. It constitutes voluntary subjection to judgment and sentence.

The result from a guilty plea or a nolo contendere plea is the same. A defendant waives all of his rights and puts his fate in the hands of a court acting upon the state's version of the evidence. A defendant pleading guilty but claiming innocence is consequently in no different a position than a person who pleads nolo contendere. "[T]he Constitution is concerned with the practical consequences, not the formal categorizations, of state law." North Carolina v. Alford, 400 U.S. at 37, 91 S.Ct. at 167, 27 L.Ed.2d at 171 (citations omitted).

The practical consequences of Jimmy Lee Smith addressing the jury were also the same as if he had entered a guilty plea. He waived the substantial rights which, together, guarantee a fair trial on the penalty determination. He gave up his right to challenge the state's evidence. He gave up his right to present evidence of mitigating circumstances and to argue their weight. He gave up his right to an attorney advocating his position. In brief, he gave up everything he would have given up had there been no hearing or if he had pled guilty to a crime.

In North Carolina v. Alford, supra, the Court rejected the contention that a plea of guilty from a man claiming innocence should never be accepted. The Court went on to examine the adequacy of the inquiry into Alford's decision to plead guilty. The trial judge had examined Alford closely about his decision. Alford stated he had not committed the crime but was pleading guilty to second degree murder to avoid the risk of a death sentence. A policeman testified and summarized the testimony of other witnesses. It had been determined that Alford was aware

of the elements and punishments of the two offenses and the differences between them. The evidence, the Court concluded, showed Alford's decision was informed and voluntary notwithstanding his claims of innocence. The Court stated that a defendant may submit to the penalty for a crime even if he is unwilling or unable to admit commission of the crime. The fullness of the inquiry into Alford's knowledge of the law under which he was charged, the facts of the alleged crime, and the reasons for his decision was a sufficient inquiry to prove that Alford's decision was a knowing, intelligent, voluntary waiver of his right to trial.

Lesser inquiries into a defendant's decision to waive all his rights and to submit to the judgment of the court has found wanting by the Supreme Court. Henderson v. Morgan, 426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976) is an example of a defective inquiry, and the inquiry contained one of the defects the inquiry into the Jimmy Lee Smith's decision contains. The United States Supreme Court vacated Morgan's conviction for second degree murder because the record did not show he knew the elements of the offense before entering his plea. Morgan stabbed a woman repeatedly. Upon the advice of his two competent lawyers he pled guilty to second degree murder rather than face trial on charges of first degree murder.

The Supreme Court determined if Morgan's plea was "voluntary in a constitutional sense" Henderson v. Morgan, 426 U.S. at 645, 96 S.Ct. at 2257, 49 L.Ed.2d at 114. It concluded the plea was not voluntary simply because there was no evidence

Morgan knew intent to kill the victim was an element of second degree murder. His admission to the actual killing did not necessarily include an admission that he meant to kill the woman. His plea was not knowingly entered unless he "received 'real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.' [Citation ommitted]" Henderson v. Morgan, 426 U.S. at 645, 96 S.Ct. at 2257, 2258, 49 L.Ed.2d at 114.

The same universal principle of due process was infringed when Judge McCrary allowed Jimmy Lee Smith to waive his rights in the sentencing proceeding and to ask the jury for the death penalty. Aggravating circumstances are essential elements of a capital crime at least one of which must be proved beyond a reasonable doubt. State v. Dixon, 283 So.2d 1 (Fla. 1973). The record does not show that Jimmy Lee Smith was informed of this. There is no showing that the trial judge or his own court-appointed lawyer explained to him the standards which determine who will receive the death penalty for capital murder. He was left to base his decision on his, for all we know, uninformed opinion.

His decision also could not have been knowingly and intelligently made if he was unaware of the statutorily designated mitigating circumstances as well as statutory aggravating ones. Mitigating circumstances are essentially defenses to a death sentence for a potentially capital crime.

Just as a defendant must be informed of the essential elements of a crime he is charged with before he may legally waive his right to dispute his guilt. Williams v. State, 316 So.2d 267 (Fla. 1975), he must also, at the very least, be informed of

any defenses he may have which are apparent from the record before the judge. State v. Lyles, 316 So.2d 277 (Fla. 1975). Although the trial court had examined Lyles as to whether his attorney told him of possible defenses and was informed Lyles had been so advised, at sentencing the defendant asserted facts which would constitute a defense. Writing for the court, Justice Overton said that once an apparent defense is before the court the judge should make a searching inquiry into the defendant's understanding of the crime charged and of any possible defenses. Because the inquiry had not been made the case was remanded for another hearing.

The United States Supreme Court, interpreting a Federal Rule of Criminal Procedure virtually identical to Florida's Rule of Criminal Procedure 3.170, in McCarthy v. United States, 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969), similarly held that a trial court must inquire into the defendant's actual understanding of the charges and their relationship to the facts before accepting a guilty plea. Without an understanding of the law in relation to the facts a defendant cannot make a truly voluntary decision to waive his rights.

The defects in the inquiry in Mr. McCarthy's waiver were similar to the defects in the inquiry into the Jimmy Lee Smith's waiver at the sentencing proceeding. Since Jimmy Lee's addressing the jury resulted in waiving the same rights, the same inquiry is needed.

The awesome finality of the death penalty itself requires no lesser inquiry. The United States Supreme Court, and this

Court, have emphasized the fundamental difference between death penalty cases and all other cases.

> "Death in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."

Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944, 961 (1976) (footnotes omitted).

Once a death sentence is executed there is no remedy for any error no matter how fundamental or grevious. Each step toward the imposition of the penalty must therefore be taken with extraordinary caution. A step such as allowing a defendant to ask for death and waive his rights in the jury protion of the sentencing proceeding should be made only after a complete inquiry into the voluntariness of the defendant's decision and his awareness of the applicable facts and law.

The requirement of a full inquiry serves not just the defendant. Society itself has a fundamental interest in a just result in every proceeding. When the penalty is death, that interest is at its greatest because an execution cannot be undone. Regardless of the defendant's wishes, the interests of justice require a searching inquiry before allowing a defendant to ask for death. The words of Chief Justice Burger, dissenting in Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed. 2d 562 (1975) are literally applicable here:

> Although we have adopted an adversary system of criminal justice, see Gideon v. Wainwright, supra, the prosecution is more than an ordinary litigant, and the trial judge is not simply an automaton who insures that technical rules are adhered to. Both are charged with

> the duty of insuring that justice, in the broadest sense of that term, is achieved in every criminal trial. See Brady v. Maryland, 373 U.S. 83, 87, and n2, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963); Berger v. United States, 295 U.S. 78, 88, 79 L. Ed. 1314, 55 S.Ct. 62 (1935). That goal is ill-served, and the integrity and public confidence in the system are undermined, when an easy conviction is obtained due to the defendant's ill-advised decision to waive counsel. The damage thus inflicted is not mitigated by the lame explanation that the defendant simply availed himself of the "freedom" "to go to jail under his own banner . . . ." United States ex rel. Maldonado v. Denno, 348 F.2d 12,15 (CA2 1965). The system of criminal justice should not be available as an instument of self-destruction.

Faretta v. California, 422 U.S. at 839, 840, 95 S.Ct. at 2543, 45 L.Ed.2d at 584 (Burger, C.J. dissenting).

If Jimmy Lee Smith's decision to address the jury had involved only a waiver of his right to counsel, the inquiry would not have been constitutionally sufficient to support a finding that his waiver was knowing and voluntary.

Justice Black explained the importance of that knowledge to a waiver of counsel in Von Moltke v. Gillies, 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309 (1947).

Ms. Von Moltke, after months of incommunicado incarceration, pled guilty to conspiring to treason. Before accepting her plea the judge asked her if she understood her rights, particularly her right to counsel. She said she understood those rights and specifically said she did not want an attorney. But, accepting for purposes of argument the validity of Ms. Von Moltke's guilty plea Justice Black emphasized the importance of the right to counsel at sentencing.

> "Even when the trial court was about to impose sentence on this petitioner following her plea of guilty, a lawyer might have rendered her invaluable aid in

> calling to the court's attention any mitigating circumstances that might have inclined him to fix a lighter penalty for her."

Id., 332 U.S. at 721, 68 S.Ct. at 322.

The remaining question in this issue is the appropriate remedy. Unlike the federal courts, Florida courts in the similar situation of guilty pleas do not automatically return a case for a new plea. Instead they return the case for inquiry into the circumstances surrounding the plea and for a determination of prejudice. State v. Kendrick, 336 So.2d 353 (Fla. 1976); Williams v. State, 316 So.2d 267 (Fla. 1975); Andrews v. State, 343 So.2d 844 (Fla. 1st DCA 1976). In this case that remedy is insufficient. Prejudice is manifest. No one can rationally say that a defendant addressing a jury and requesting the death penalty would not have an inordinate effect upon the jury's recommendation or the judge's subsequent decision. The error in the present case is not the assertion of a possible defense as in Lyles v. State, supra. It is the kind of error in Henderson v. Morgan, supra, requiring the sentence to be vacated and a new penalty hearing conducted at which it will be fully determined that appellant is knowingly proceeding with or without counsel.

This court's reasoning in Land v. State, 293 So.2d 704 (Fla. 1974) and Greene v. State, 351 So.2d 941 (Fla. 1977) sets forth another reason that a new sentencing hearing is the only appropriate remedy.

In Land, the court's opinion acknowledged that granting new trials for error in pre-trial judicial proceedings was an unwieldy remedy. But due process outweighed judicial economy.

Quoting Judge Johnson's dissent below this Court explained;

> ". . . . I have serious doubts that a trial judge, after conviction by a jury composed of fellow community members and probable friends of whose opinion he may view with a high regard, can any more be uninfluenced by such a jury conviction than the jury can be uninfluenced by the fact of the confession."

Land v. State, 293 So.2d at 708 (footnote omitted, emphasis by the court).

The same consideration applies here. Jimmy Lee Smith has been convicted in a small community of two sensational killings. There must be serious doubt that any judge could retrospectively sit in neutral judgment of the voluntariness of the defendant's decision to address the jury without counsel and to urge a recommendation for the death penalty without being affected by the jury's recommendation and the fact that sentence has previously been imposed. See also, Greene v. State, supra at 942, and Wilcox v. State, 367 So.2d 1020,1024 (Fla. 1979).

The error below was the judge's inadequate, although, well-meaning inquiry into Smith's decision to address the jury without counsel. The remedy this court should grant is a new sentencing hearing.

ISSUE VII

THE TRIAL COURT ERRED IN CONSIDERING SMITH'S UNCORROBORATED STATEMENTS OF VARIOUS CRIMES, IN SENTENCING, WHEN THERE WAS NO SHOWING OF A CORPUS DELICTI FOR ANY PRIOR OFFENSES.

The judge found the evidence "clearly" showed Jimmy Lee Smith had a significant history of prior criminal activity (R-78,721). Yet, Jimmy's statements in his videotape confession were the only evidence before the judge of prior criminal activity. There was no evidence that the confessed prior crimes had ever occurred nor that these crimes were believed by any law enforcement agency to have actually occurred.

The corpus delicti principle requires some independent proof of a crime other than a person's confession before a conviction can rest upon it. Frazier v. State, 107 So.2d 16 (Fla. 1978); Nickels v. State, 90 Fla. 659, 106 So. 479 (1925); Jefferson v. Sweat, 76 So.2d 494 (Fla. 1954); Savage v. State, 152 Fla. 367, 11 So.2d 778 (1943). Appellant's out-of-court statements are insufficient proof of crime to base a conviction and would seem similarly insufficient to base a finding as fact of prior criminal activity upon which to impose a death sentence. See, Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); Lee v. State, 96 Fla. 59, 117 So. 699 (1928); Tucker v. State, 64 Fla. 518, 59 So. 941 (1912); Brown v. State, 44 Fla. 28, 32 So. 107 (1902); Farley v. City of Tallahassee, 243 So.2d 161 (Fla. 1st DCA 1971); Alexander v. State, 107 So. 2d 261 (Fla. 2d DCA 1958).

Unlike the other mitigating circumstances of Section

921.141(6), Florida Statutes (1977) "no significant history of prior criminal activity" is not readily or easily susceptible to positive proof by the defendant. A barren record would indicate no significant criminal history. That the defendant had no prior criminal history is the only rational inference which could be drawn from an absence of proof.

The aggravating circumstances help define the truly capital crime and must be proven beyond a reasonable doubt. State v. Dixon, 283 So.2d 1 (Fla. 1973). Without significant prior history of criminal activity each capital felon would have at one mitigating circumstance to be weighed with any aggravating circumstance(s) found. This particular mitigating factor in the statute can, if judge or jury are incautious, be mistakenly applied as if it were an aggravating circumstance in cases where a significant criminal history is proven to exist. Mikenas v. State, 367 So.2d 606 (Fla. 1978).

The United States Supreme Court has emphasized the critical importance of evidence relating to mitigating circumstances to a constitutionally imposed death sentence. Lockett v. Ohio, 438 U.S. _____, 98 S.Ct. 704, 57 L.Ed.2d 973 (1978); Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2 944 (1976).

> This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Id., 49 L.Ed.2d at 961.

Because of the long history with untrustworthy confessions, the courts from early common law adhered to the corpus delicti rule to insure that false convictions do not occur. McElveen v. State, 72 So.2d 785 (Fla. 1954). An extensive and thoroughly intensive review of the rule appears in Note, Proof of the Corpus Delicti Aliunde the Defendant's Confession, 103 U. of Penn. L. Rev. 638 (1955). The principle was stated by Justice Drew, dissenting in McElveen v. State, supra at 785:

> Much more is involved here than the guilt or innocence of two mature men charged with a repulsive crime. A principle of law that is basic in our jurisprudence is involved. In fine, it is that principle which prohibits punishment for crime on a naked confession without additional proof of the corpus delicti. If this principle of law had been as deeply imbedded in the jurisprudence of some other countries as it is in our own there is little doubt that many who are now dead would be living and many innocent people now rotting in the dungeons of many foreign prisons would be free.
> (Emphasis supplied.)

The need for the corpus delicti rule is the greatest in capital sentencing. Unless there is a requirement, parallel to the one at trial, for proof at sentencing in capital cases, this state will have abandoned a rule deemed necessary to protect persons from false convictions. Thus, the corpus delicti rule should be applicable, and is indeed necessary, where prior criminal activity is a factor in aggravation or to negate mitigation in a capital case. See, Section 92.141(5)(b) and (6)(a).

In Woodson v. North Carolina, 428 U.S. 280, 305 (1976), the Court said the qualitative difference between death and every other penalty which may be imposed mandates a corresponding difference in the need for reliability that death is the

appropropriate punishment under the applicable law.

It is, therefore, difficult to imagine any rationale to abolish the corpus delicti rule in considering the sentencing criteria of prior criminal history under Section 921.141(5)(b) and (6)(a). A lower standard of proof substantially impairs the truth-finding function. Witherspoon v. Illinois, 391 U.S. 510, 522 n. 20 (1968).

"Under this rule, until the state has established by evidence, entirely independent of the confession itself, that a criminal act has been committed by someone, the confession is not admissible." Margolis, Corpus Delicti: State of Disunion, Vol. II Suffolk Univ. L.Rev. 44,45 (Winter, 1968). There is no uncertainty in Florida about the meaning of our corpus delicti rule nor of its application in criminal trials. But there remains the need for this court to apply it to the factual determination at the sentencing portion of capital trial proceedings.

The origins of the rule trace at least to the time of Star Chamber. See, Margolis, supra at 46; 8 Wigmore, Evidence 275-304 (3rd Ed. 1940); Miranda v. Arizona, 384 U.S. 436, 458-60 (1966).

In Smith v. United States, 348 U.S. 147, 153 (1954), the Court noted the historical experience with false confessional statements:

> Its purpose is to prevent "errors in convictions based upon untrue confessions alone" . . . its foundation lies in a long history of judicial experience with confessions and in the realization that sound law enforcement requires police investigations which

> extend beyond the words of the accused . . . . Moreover, though a statement may not be "involuntary" within the meaning of this exclusionary rule, still its reliability may be suspect if it is extracted from one who is under the pressure of a police investigation -- whose words may reflect the strain and confusion attending his predicament rather than a clear reflection of his past. Finally, the experience of the courts, the police, and the medical profession recount a number of false confessions voluntarily made. . . .

This state requires prima facie evidence prior to use of a defendant's out-of-court confession. Shuler v. State, 132 So.2d 7,8 (Fla. 1961). Until such proof is presented, the defendant's extra-judicial statement should not be used for any purpose. See, People v. Grimes, 91 Cal.App.2d 629,632, 205 P.2d 416,417 (1949).

Appellant made the astounding statement of having raped more than 12 women in Texas, of having murdered one person and of having stolen one-hundred automobiles. Yet, the state failed to show that a single such crime had occurred or even had been reported as having occurred.

To entrust the decision of the death penalty to unsubstantiated statements is to throw caution to the wind. If any such crimes were in fact committed, some evidence to corroborate these "confessed" crimes would be readily obtainable by the state. Where the difference between life and death is at issue, the corpus delicti rule serves the critical role of ensuring accuracy in the ultimate determination. Without it, an erroneous result is unnecessarily risked.

The penalty proceeding must be conducted anew if the court

applies the corpus delicti rule to the penalty phase of capital trials.

> Finally, the experience of the courts, the police and the medical profession recounts a number of false confessions voluntarily made, Note, 28 Ind. L.J. 374. These are considerations which justify a restriction on the power of the jury to convict, for this experience with confessions is not shared by the average juror.

Smith v. United State, supra, 348 U.S. at 147.

In conclusion, if Jimmy Lee Smith's statements of prior crimes were untrue, being the product of delusional thought disorder or the product of a self-destructive desire, then these death sentences rest upon an erroneous foundation. Appellant prays the court will adhere to the rule long established as essential to prevent injustice and that this cause will be remanded for a new jury to be impaneled to consider the evidence relevant to its sentencing recommendation.

ISSUE VIII

ARE THE JUDGE'S FINDINGS THAT THERE WAS NO EVIDENCE JIMMY LEE SMITH SUFFERED FROM AN EXTREME MENTAL OR EMOTIONAL DISTURBANCE AND THAT HE DID NOT SUFFER FROM SUBSTANTIAL IMPAIRMENT OF HIS CAPACITY TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT AND ABILITY TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW SUPPORTED BY A RECORD WHICH SHOWS HE WAS UNABLE TO CONTROL HIS ACTIONS AND THAT PSYCHOLOGISTS CONCLUDED HE HAD A PROFOUND DEFICIENCY IN CHARACTER DEVELOPMENT WHICH INCLUDED WEAK EMOTIONAL AND BEHAVIORAL CONTROLS WHICH BROKE DOWN UNDER STRESS?

Extreme mental or emotional disturbances and substantial impairment of a person's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law are each mitigating circumstances a judge must weigh in sentencing a person for a capital crime. §921.41(6)(b),(f), Fla.Stat. (1977). Despite evidence of both circumstances, the judge ruled there was no evidence that Jimmy Lee Smith suffered from extreme mental or emotional disturbance. Without explanation the judge stated Jimmy Lee's ability to appreciate the criminality of his conduct or to conform his activities to the requirements of law was not substantially impaired (R-3). Such finding is not in accord with the evidence.

Consideration of all mitigating circumstances of the case is required by the United States Constitution. Lockett v. Ohio, 438 U.S. ___, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L. Ed.2d 944 (1976).

"The most important safeguard presented [a defendant] in Fla. Stat. §921.141, F.S.A., is the propounding of

aggravating and mitigating circumstances which must be determinative of the sentence imposed.

State v. Dixon, 283 So.2d 1,8 (Fla. 1973).

> Extreme mental or emotional disturbance is a second mitigating consideration, pursuant to Fla.Stat. §921.141(7)(b), F.S.A., which is easily interpreted as less than insanity but more than the emotions of an average man, however inflamed.
>
> * * *
>
> Mental disturbance which interferes with but does not objiate the defendant's knowledge of right and wrong may also be considered as a mitigating circumstance. Fla.Stat. §921.141(7)(f), F.S.A. Like subsection (b), this circumstance is provided to protect that person who, while legally answerable for his actions, may be deserving of some mitigation of sentence because of his mental state.

State v. Dixon, 283 So.2d at 10.

Evidence of these, and the other mitigating circumstances must be carefully weighed by the trial judge. Without consideration of mitigating circumstances or explanation of their rejection, the decision to execute a person cannot be rationally made.

This court has recognized the omportance of consideration of evidence of the mitigating circumstances involved here, and when judges have ignored evidence or weighed it irrationally the court has vacated the death penalties imposed. Shue v. State, 366 So.2d 387 (Fla. 1978); Burch v. State, 343 So.2d 831 (Fla. 1977); Huckaby v. State, 353 So.2d 29 Fla. 1977).

It is exceedingly important when the mitigating evidence is also causally related to an aggravating circumstance such as

that the crime was especially heinous, atrocious, or cruel, for the trial judge to evaluate and weigh carefully the aggravating and mitigating in their proper categories. Huckaby v. State, supra. The record contains considerable evidence both that Jimmy Lee suffered from an extreme mental or emotional disturbance and that his ability to appreciate the criminality of his conduct and to conform his acts to the requirements of law was substantially impaired at the time of the crime. Those circumstances are linked to the primary aggravating circumstance used to justify his death penalty, the judge's finding that the killings were especially heinous, atrocious, and cruel. (See, Miller v. State, Case (No. 50,606 (Fla.S.Ct. May (10, 1979)

Doctors McMahon and Satz after testing and interviewing Jimmy Lee Smith found he had "a profound deficiency in character development and the associated problems in impulse control." (R-27). The experts further stated:

> [W]hen under stress his emotional and behavioral controls break down and this wall of anger comes surging forward; so much so that taking a life is not sufficient to quell it - he must also mutilate in order for his intense feelings to abate. By the same token, Jimmy reports experiencing a strange odor and taste at these times. This suggests the possibility of a subcortical, limbic system type of seizure which occurs only in the presence of very forceful affect and which may account for some of the more bizarre details of his behavior.

(R-26,27)(emphasis in the original).

Jimmy's statements about his feelings and motivations support the doctors' evaluation of his unusually weak ability to control his emotions. He stated he did not know why he committed the murders (R-305). Something inside drove him, (R-626), something he could not control (R-639,640,641). He thought he was insane (R-637). During the killings he did not know that

he was doing wrong and was unable to control himself:

> I mean, sitting here now, I know it was wrong, but at the actual time of the happening of it, I had no control of myself to know that it was right or wrong. I mean, - I would have to say no. I mean, sitting here, I know for a fact that I know beyond a shadow of a doubt that it was wrong, but during the actual time it went on I just don't know.

(R-643).

The lack of control was so extensive Jimmy could not even explain the strangest of his actions, stripping the clothing from the bodies. (R-329,452,453,625).

His actions after the capital crime itself were so bizarre that they indicate strongly the compulsion of severe mental illness. In this way the killing is different from the vast majority of capital cases. Killings are usually triggered by some remotely understandable situation, but here not only are the killings unexplainable save for by an emotional and mental disturbance, their manner is otherwise inexplicable. Clothing was removed from bodies Jimmy believed to be dead. He could not explain the act. The dead bodies were repeatedly stabbed, inexplicable actions Jimmy said he could not control. Here was evidence of a mental disturbance "less than insanity but more than the emotions of an average man, however inflamed." State v. Dixon , 283 So.2d at 10.

Jimmy was raised in an environment which could warp the strongest character. In his extreme youth his grandfather kept a baseball bat at hand for beating Jimmy (R-553). His father died in a car wreck. Jimmy believed the death was "[d]ue to me." (R-554).

His mother remarried a man who beat Jimmy and his brothers bloody. (R-564,565,566). He saw his mother beaten (R-564). In the boy's school, Jimmy was beaten and forced to hug and kiss the dogs which had tracked him down (R-578). In prison he was raped five times (R-588,590). His childhood matches a description this court gave another: "[I]t . . . was one of brutality and deprivation." Shue v. State, supra, 366 So.2d at 389.

The doctors' report, Jimmy's personal history, and his personal descriptions of his crime and his motivations are all evidence of an extreme emotional and mental disturbance and a substantial impairment of his ability to appreciate the criminality of his conduct and to conform to the requirements of the law. All this the trial judge ignored without explanation.

Evidence similar to the evidence in this case was considered to be mitigating in Burch v. State, supra, Shue v. State, supra, and Huckaby v. State, supra. It is the kind of evidence which should be considered in any rational application of Florida's death penalty law. The three examining psychiatrists in Burch v. State, as in this case, found the defendant sane. But one of the three said Burch may have suffered from a temporary psychotic breakdown before or after the killing. Burch like Jimmy Lee Smith had stabbed his victim repeatedly. Also lay witnesses testified about Burch's mental capacities. Such as it was, the evidence of Burch's impaired ability to appreciate the criminality of his acts was sufficient to establish an impaired mental condition and required vacating the death sentence.

The doctors examining Jimmy Lee Smith suspected he suffered

from an organic brain disorder which could explain the very details the judge relied upon to determine the killings were especially heinous, atrocious and cruel. The doctors also definitely said Jimmy was handicapped emotionally.

Evidence similar to the evidence in this case also required vacating a death sentence in Shue v. State, supra. Shue's crime was sexual battery of children. His criminal record included some related crimes. This court ruled the criminal record could be evidence of a continuing mental disorder of a substantial nature. She was another victim of a brutal childhood. The trial judge's finding that there were no mitigating circumstances cannot stand in the face of such evidence in the present case. Likewise the trial judge's finding that there was no evidence Jimmy Lee Smith suffered from extreme mental or emotional disturbance cannot stand because such evidence is apparent in the record.

Burch, supra, and Shue, supra, were both cases in which the jury recommended life imprisonment. The jury recommendation, while significat to the court's ultimate holding in those cases, does not change the relevance of their holdings to showing the judge erred below. The judge stated there was no evidence of an extreme mental or emotional disturbance. In reinstating the jury's life recommendations in Burch and Shue this court specifically held evidence such as a history of bizarre crimes, a brutal childhood, expert testimony of a possibility of a significant mental disorder and the inexplicable peverseness of a crime were evidence of an extreme mental or emotional disturbance. With evidence of all these factors in the trial of Jimmy

Lee Smith the judge stated there was no evidence of an extreme mental or emotional disturbance. Cf. Dobbert v. State, 328 So.2d 433 (Fla. 1976) (where the judge considered the evidence but determined it insufficient and explained his determination). Here the judge completely ignored evidence this court has ruled significant.

The same evidence, this court has also ruled, is sufficient to prove a substantially impaired ability to appreciate the criminality of a person's conduct or to conform a person's actions to the requirements of law. Without explaining why he rejected this evidence of Jimmy Lee's impaired capacities, the court below concluded his capacities were not impaired. Without an explanation his rejection of this evidence this court cannot determine the rationality of the decision. Cf., Hargrave v. State, Case No. 48,135 (Fla. S.Ct. June 16, 1978), (sentencing order discussed evidence of personality defect and evidence of impaired capacity but rationally explained its rejection; approved and distinguished as not being the case where the judge did not consider matters he should have; instead he conscientiously assessed all of the evidence).

The judge's failure to consider evidence of extreme disturbances and impaired capacities and abilities in Huckaby v. State, supra, caused this court to reduce a death sentence despite a jury's recommendation of death. There was medical evidence Huckaby had psychiatric problems. The judge's sentencing order stated there was no proof of any mitigating circumstance. Vacating the sentence this court observed:

> The trial judge ignored every aspect of the medical testimony in this case when he found that no mitigating circumstances existed.

Huckaby v. State, 343 So.2d at 33.

In the one instance, rejection of evidence of extreme mental or emotional disturbance is clearly unsupported, and in fact contradicted, by the evidence. In the other instance, the rejection of evidence of Jimmy Lee Smith's ability to conform his conduct to law and to appreciate the criminality of his conduct is unexplained. But the evidence supports a finding this factor also is present in mitigation. Thus the sentence is irrational on the record of this case.

Wherefore, it is prayed the court will reduce the sentence to life imprisonment or that a new sentencing hearing in the trial court will be ordered.

ISSUE IX

WERE JIMMY LEE'S CONTRADICTORY OUT-OF-COURT STATEMENTS SUFFICIENT EVIDENCE TO PROVE BEYOND THE CONSTITUTIONALLY REQUIRED REASONABLE DOUBT THAT HE KILLED DONNA LYNN STRICKLAND TO HINDER LAW ENFORCEMENT?

The judge's finding that Jimmy Lee killed Ms. Strickland to hinder law enforcement is not supported by the evidence. Aggravating circumstances are essential elements of capital crimes and must be proved beyond a reasonable doubt before they may be used to support a death sentence. State v. Dixon, 283 So.2d 1 (Fla. 1973). The Constitutions of the United States and of Florida allow no lesser proof to support a conviction. In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Boatman, 329 So.2d 309 (1976), (Boyd, J. dissenting). The similiar aggravating circumstance, Section 921.141(5)(e) Florida Statutes (1977), has not been proven "unless it is clearly shown that the dominant or only motive for the murder was the elimination of witnesses." Menendez v. State, Case No. 49,294 (Fla. Jan. 25, 1979), pet.reh. stricken April 20, 1979 at 8. The only evidence of Jimmy's reason for killing Donna Strickland are his statements, and they are so contradictory they are insufficient to constitute proof beyond a reasonable doubt.

One of several out-of-court inconsistent statements of a single witness are insufficient to prove a fact, by a preponderance of the evidence let alone a reasonable doubt, unless the contradictions are explained or one version is corroborated by independent proof. See, Wade v. Chandler, 15 Fla.Sup. 67 (Okaloosa Cir. Ct. 1959); Letner v. State, 512 S.W.2d 643 (Tenn.

Crim. App. 1974); Wigham v. Ben Franklin Division of City Products Corp., 459 S.W.2d 32 (Mo.Ct.App. 1970); Ianni v. Grain Dealers Mutual Insurance Corp., 42 Wis.2d 354, 166 N.W.2d 148 (1969); Pritt v. Terminal Railroad Association of St. Louis, 359 Mo. 896, 224 S.W.2d 119, (1949). Cf. Kuehmsted v. Turnwall, 115 Fla. 692, 155 So. 847 (1934), (irreconcilable inconsistencies among witnesses' testimony renders their testimony incompetent evidence); City of Coral Gables v. Brasher, 132 So.2d 442 (Fla. 3d DCA 1961), (irreconcilably conflicting expert opinions balance each other out and leave no evidence to rely on). Inconsistent statements have no probative value because rationally determining which is truthful is impossible. They are made by the same person. To believe one a jury must disbelieve the other. Without corroborating evidence or an explanation of the contradiction there is no rational reason for choosing one over the other. Wigham, supra; Wade, supra; Pritt, supra. Rational decision making is what the due process clause guarantees, and it is critically important in capital cases. There is no rational way to cull the truth from Jimmy Lee's inconsistent out-of-court statements.

The record here shows no rational reason for believing one statement Jimmy made about his motives for killing Donna Strickland over his other statements. If anything a rational weighing of the evidence shows he did not kill Donna Strickland to silence her.

The only evidence relevant to Jimmy's motives for killing Donna is the statements Investigator Steverson took from Jimmy. Before the jury (and now this Court) were five out-of-court

statements, a written statement taken May 5th, Investigator Steverson's report of an oral statement taken the same day, a transcript of an interview on May 9, a transcript of a May 16th interview, and a videotape of a May 6th interview. Only once, in the May 9th statement, did Jim indicate he killed Donna Strickland to avoid arrest. He said:

> "Donna came up and saw what I had done to her [Ms. Ward], and she didn't scream or anything, but she just came running over there, and so, naturally, when I saw her, you know, in sight, I knew that if I had just, you know, in other words, if I hadn't done nothing to her and took them back, she would have told, you know. I mean, she, she would have, you know, knew what happened."

(R-430).

Every other statement shows he killed Donna "out of anger, from bad things that she was saying about the Flowerses" (R-547) and "something that is inside of me [Jimmy], something that drove me to do this." (R-626). See also, (R-407,410,414,452, 455,547,610). In the oral May 5th interview Jim said he decided to kill both women while traveling to Graceville (R-410, 417). This was obviously long before Donna walked up on Jimmy and Ms. Ward. In the same statement he said he killed both women because of his anger and his compulsion (R-411). Donna was cut more severely because he was angrier at her (R-414,415, 621).

Jimmy said in the May 16th interview he killed Donna because he could not control his inner drive to hurt (R-445). Again, in the May 6th videotaped interview, Jimmy said he planned from the outset to kill both women (R-547,609). Even in the May 9th interview Jimmy indicated anger caused his

attack on Donna (R-452,455).

The single statement that he killed Donna Strickland to avoid arrest is easily the less credible. It was only made once. His treatment of the other two children does not indicate a lethal desire to avoid arrest. He rejected the idea of killing them. Instead he took them home, fed them, and put them to bed (R-432,626). The children were young, three and two years old, but old enough to remember where, when, and with whom they last saw their mother. Later one of the children, as would be expected, directed a deputy to the murder scene (R-272-273,286,287).

Jimmy's statements are at best hopelessly contradictory. There is no logical reason to accept his one statement that he killed Donna Strickland to quiet her over his several statements, direct and indirect, that he killed her and her mother because of his anger and uncontrollable unexplainable inner drives. The usual explanation for accepting a jury's resolution of contradicting testimony is not present in this case. The jury did not hear or see a witness. It considered only a written statement, transcripts, and a videotape. Thus the jury did not have a witness' demeanor to evaluate and perhaps convince it of one statement's veracity. This court has cautioned:

> that the mere fact of a death is not enough to invoke this factor [§921.141(5)(e), Fla. Stat. (1977); killing to avoid arrest]when the victim is not a law enforcement official. Proof of the requisite intent to avoid arrest and detection must be very strong in these cases.

Riley v. State, 366 So.2d 19, 22 (Fla. 1978).

The mere fact of death is all the legally credible evidence

in this case shows.

More certain evidence than this was found wanting in Menendez, supra. Antonio Menendez drew a gun and grabbed for a customer who walked in on him emptying a store safe. Later the store's owner was found by the safe, shot dead, apparently while supplicating. He was killed with a silenced gun. The evidence indicated the killing was to avoid arrest. The store owner was a witness to the robbery. He apparently was helpness. Use of a silencer could be construed as evidence of acting to avoid arrest. Menendez moved against another witness. Yet all this evidence was insufficient to prove Menendez killed to avoid arrest.

The evidence that Jimmy Lee Smith killed Donna Strickland to avoid arrest is weaker than the evidence against Menendez was. Jimmy's statements are too contradictory to be relied upon. The remaining evidence only shows that two bodies were found and two witnesses who could identify Jimmy were returned home unharmed. That evidence fits any one explanation for Donna's death as well as it fits another. It proves nothing beyond a reasonable doubt. The rational decision-making required by due process, the United States Supreme Court, and the Florida Supreme Court was not given Jimmy.

If there were any doubt about the sufficiency of the evidence this court is in a position to determine for itself whether the finding is supported by the record. It has before it exactly the same evidence the jury had. In these circumstances the fact finder's presumption of correctness is slight.

The factor giving it weight, an opportunity to observe a witness' demeanor, is not present. Westshore Restaurant Corporation v. Turk, 101 So.2d 123 (Fla. 1958); Hilton v. Upton, 203 So.2d 352 (Fla. 1st DCA 1967); Julian v. Julian, 188 So.2d 896 (Fla. 2d DCA 1966). In fact this court's review can be more accurate because it has the transcripts to review while the jury had only a reading of them. As already set out, a review of the evidence shows it is not sufficient to prove beyond a reasonable doubt that Jimmy Smith killed Donna Strickland to hinder law enforcement. Allowing that finding to stand deprives him of due process and the rational decision making this court promised society and capital defendants in Dixon. The finding of the aggravating circumstance of killing to hinder law enforcement should be reversed.

IV CONCLUSION

Jimmy Lee Smith's trial was flawed with errors which require a new trial or at least a new sentencing hearing to remedy. He was sentenced to death in an unconstitutional procedure. This court does not have a complete record of his trial to review. The court dismissed jurors without first accurately determining the effect of their qualms about capital punishment upon their ability to sit in impartial judgment.

Contradictory and for the most part unsubstantiated confessions were relied on by the state. They alone are insufficient to establish the existence of one aggravating circumstance found and the abscence of one mitigating circumstance. Evidence of mitigating circumstances was inexplicably ignored. The judge, rather than warning the jury of confessions' inherent unreliability commented favorably upon them as evidence.

Relying upon insufficient evidence and improperly rejecting other evidence, the judge incorrectly weighed the aggravating and mitigating circumstances in his sentencing order.

The judge allowed Jimmy to waive constitutional rights during the sentencing proceeding without adequately inquiring into Jimmy's knowledge of his rights and the crimes he was charged with. Medical literature indicates an important error in a major

piece of evidence, the psychologists' report.

Jimmy Lee Smith asks this court to reverse the judgment and sentence resulting from these flawed proceedings and to remand this cause for a new trial or any other relief the court deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished by hand-delivery to the Honorable Jim Smith, Attorney General, the Capitol Building, Tallahassee, Florida, and a copy has been furnished by mail to Jimmy Lee Smith, R-3-S-5-#A-035167, Florida State Prison, Post Office Box 747, Starke, Florida, on this 14th day of May, 1979.

JOHN D.C. NEWTON, II

NO. 81-6437

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JIMMY LEE SMITH,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

REPLY BRIEF

ON PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF FLORIDA

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QUESTION PRESENTED

QUESTION	PAGE(S)
THE FLORIDA SUPREME COURT'S AFFIRMANCE OF PETITIONER'S CONVICTION AND DEATH SENTENCE, IN WHICH IT APPROVED A PRACTICE WHEREIN THE TRIAL COURT SPECIFICALLY ADVISED THE JURY THAT HE HAD FOUND PETITIONER'S CONFESSION TO BE VOLUNTARY, LEFT UNREDRESSED A VIOLATION OF PETITIONER'S RIGHT TO DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS, AND ESTABLISHED PRECEDENT WHICH WILL PERMIT AND PERHAPS ENCOURAGE SUCH CONSTITUTIONALLY IMPROPER DISCLOSURE IN SUBSEQUENT CRIMINAL TRIALS.	1

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REASONS FOR GRANTING WRIT

QUESTION PRESENTED

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In its response to the petition for writ of certiorari in this case, the state contended that the decision of the Eighth Circuit Court of Appeals in United States v. Bear Killer, 534 F.2d 1253 (8th Cir. 1976) is "erroneous" (response, p. 3, lines 20-21), and that it "erroneously overlooked" this Court's decision in Pinto v. Pierce, 389 U.S. 31 (1967) (response, p. 3, lines 29-32). Petitioner of course disagrees with the state's contention that Bear Killer was wrongly decided, since, as correctly noted by the state, petitioner is relying heavily on that case in seeking certiorari.

It is not altogether clear whether the state is arguing that Bear Killer was incorrect in holding that the trial court's finding of voluntariness should not be disclosed to the jury [see petition for writ of certiorari, p. 5-6, citing decisions of the Second, Fourth, Fifth, Ninth and District of Columbia Circuits, as well as several state appellate courts, which indicate agreement with Bear Killer on this point], or whether the state is simply arguing that Bear Killer was inccrrect in discerning a constitutional basis for its holding, or both. Since the state insists that Bear Killer was based solely on federal statute (response, p. 3, lines 6-15), notwithstanding the clear language in that opinion to the contrary (see United States v. Bear Killer, supra, at 1259; petition for writ of certiorari, p. 7-8), it appears that the state's position is that disclosure of the court's finding of voluntariness is permissible under Pinto v. Pierce, supra; that the Florida Supreme Court correctly

so held in the present case; and that petitioner and the Eighth Circuit in Bear Killer are wrong. (See response, p. 3-5).

Supreme Court rule 17.1(b) indicates that one of the prime reasons for this Court to consider granting certiorari is conflict between a state court of last resort and a federal court of appeals on a federal question. The state's Response clearly demonstrates the existence of such conflict in the instant capital case.

CONCLUSION

WHEREFORE, the petition for writ of certiorari should be granted.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Petition for Writ of Certiorari to the Supreme Court of Florida has been furnished by U.S. mail to the Honorable Alexander L. Stevas,, Clerk of the United States Supreme Court, First and Maryland Avenue, Northeast, Washington, D.C. 20543; Mr. Jimmy Lee Smith, #035167, Post Office Box 747, Starke, Florida 32091; and by hand-delivery to the Honorable Sid White, Clerk of the Supreme Court of Florida; Supreme Court Building, Tallahassee, Florida; and the Honorable Jim Smith, Attorney General, The Capitol, Tallahassee, Florida; on this 30th day of April, 1982.

STEVEN L. BOLOTIN